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REPORTS OF CASES
DECIDED IN THE
APPELLATE COURTS
OF THE
STATE OF ILLINOIS

AT THE MARCH AND OCTOBER TERMS, 1897, OF THE FIRST DISTRICT, THE
MAY TERM, 1897, OF THE SECOND DISTRICT, AND THE
MAY TERM, 1897, OF THE THIRD
DISTRICT.

VOL. LXXII

REPORTED BY
MARTIN L. NEWELL
COUNSELOR AT LAW

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THE APPELLATE COURTS OF ILLINOIS

These Courts are held by Judges of the Circuit Courts assigned by the Supreme Court for a term of three years. One Clerk is elected in each district.

MARTIN L. NEWELL, Reporter, Springfield, Illinois.

FIRST DISTRICT.

Composed of the county of Cook.

Court sits at Chicago on the first Tuesdays of March and October.

CLERK—Thomas N. Jamieson, Ashland Block, Chicago.

JUSTICES.

FRANCIS ADAMS, Ashland Block, Chicago, Illinois.

NATHANIEL C. SEARS, " " " "

THOMAS G. WINDES, " " " "

SECOND DISTRICT.

Composed of the Northern Grand Division of the Supreme Court, except Cook county.

Court sits at Ottawa, LaSalle county, on the third Tuesday in May, and the first Tuesday in December.

CLERK—Columbus C. Duffy, Ottawa, Illinois.

JUSTICES.

JOHN D. CRABTREE, Dixon, Illinois.

DORRANCE DIBELL, Joliet, "

FRANCIS M. WRIGHT, Urbana, "

THIRD DISTRICT.

Composed of the Central Grand Division of the Supreme Court.

Court sits at Springfield, Sangamon county, on the third Tuesdays in May and November.

CLERK—W. C. Hippard, Springfield, Illinois.

JUSTICES.

OLIVER A. HARKER, Carbondale, Illinois.

BENJAMIN R. BURROUGHS, Edwardsville, Illinois.

JOHN J. GLENN, Monmouth, Illinois.

FOURTH DISTRICT.

Composed of the Southern Grand Division of the Supreme Court.

Court sits at Mount Vernon, Jefferson county, on the fourth Tuesdays in February and August.

CLERK—Frank W. Havill, Mount Vernon, Illinois.

JUSTICES.

JAMES A. CREIGHTON, Springfield, Illinois.

NICHOLAS E. WORTHINGTON, Peoria, "

HIRAM BIGELOW, Galva, "

BRANCH OF THE APPELLATE COURT—FIRST DISTRICT.

This Court is held by three Judges of the Circuit Court, designated and assigned by the Supreme Court under the provisions of the Act of the General Assembly, approved June 2, 1897, Hurd's Statute, 1897, 508; Laws of 1897, 185.

JUSTICES.

HENRY M. SHEPARD, Chicago, Illinois.

OLIVER H. HORTON, " "

HENRY V. FREEMAN, " "

CIRCUIT COURTS.

Exclusive of Cook county, the State of Illinois is divided into Seventeen Judicial Circuits, as follows:

First Circuit.—The counties of Alexander, Pulaski, Massac, Pope, Johnson, Union, Jackson, Williamson and Saline.

JUDGES.

JOSEPH P. ROBERTS, Cairo, Illinois.
OLIVER A. HARKER, Carbondale, "
ALONZO K. VICKERS, Vienna, "

Second Circuit.—The counties of Hardin, Gallatin, White, Hamilton, Franklin, Wabash, Edwards, Wayne, Jefferson, Richland, Lawrence and Crawford.

JUDGES.

EDMUND D. YOUNGBLOOD, Mount Vernon, Illinois.
PRINCE A. PEARCE, Carmi, "
ENOCH E. NEWLIN, Robinson, "

Third Circuit.—The counties of Randolph, Monroe, St. Clair, Madison, Bond, Washington and Perry.

JUDGES.

BENJAMIN R. BURROUGHS, Edwardsville, Illinois.
MARTIN W. SCHAEFFER, Belleville, "
WILLIAM HARTZELL, Chester, "

Fourth Circuit.—The counties of Clinton, Marion, Clay, Fayette, Effingham, Jasper, Montgomery, Shelby and Christian.

JUDGES.

WILLIAM M. FARMER, Vandalia, Illinois.
TRUMAN E. AMES, Shelbyville, "
SAMUEL L. DWIGHT, Centralia, "

Fifth Circuit.—The counties of Vermilion, Edgar, Clark, Cumberland and Coles.

JUDGES.

HENRY VAN SELLAR, Paris, Illinois.
FERDINAND BOOKWALTER, Danville, "
FRANK K. DUNN, Charleston, "

Sixth Circuit.—The counties of Champaign, Douglas, Moultrie, Macon, DeWitt and Piatt.

JUDGES.

FRANCIS M. WRIGHT, Urbana, Illinois.
EDWARD P. VAIL, Decatur, "
WILLIAM G. COCHRAN, Sullivan, "

Seventh Circuit.—The counties of Sangamon, Macoupin, Morgan, Scott, Green and Jersey.

JUDGES.

JAMES A. CREIGHTON, Springfield, Illinois.
ROBERT B. SHIRLEY, Carlinville, "
OWEN P. THOMPSON, Jacksonville, "

Eighth Circuit.—The counties of Adams, Schuyler, Mason, Cass, Brown, Pike, Calhoun and Menard.

JUDGES.

JOHN C. BROADY, Quincy, Illinois.
HARRY HIGBEE, Pittsfield, "
THOMAS N. MEHAN, Mason City, "

Ninth Circuit.—The counties of Knox, Warren, Henderson, Hancock, McDonough and Fulton.

JUDGES.

JOHN J. GLENN, Monmouth, Illinois.
GEORGE W. THOMPSON, Galesburg, "
JOHN A. GRAY, Canton, "

Tenth Circuit.—The counties of Peoria, Marshall, Putnam, Stark and Tazewell.

JUDGES.

LESLIE D. PUTERBAUGH, Peoria, Illinois.
THOMAS M. SHAW, Lacon, "
NICHOLAS E. WORTHINGTON, Peoria, "

Eleventh Circuit.—The counties of McLean, Livingston, Logan, Ford and Woodford.

JUDGES.

COLOSTIN D. MYERS, Bloomington, Illinois.
GEORGE W. PATTON, Pontiac, "
JOHN H. MOFFETT, Paxton, "

Twelfth Circuit.—The counties of Will, Kankakee and Iroquois.

JUDGES.

DORRANCE DIBELL, Joliet, Illinois.
ROBERT W. HILSCHER, Watseka, "
JOHN SMALL, Kankakee, "

Thirteenth Circuit.—The counties of Bureau, LaSalle and Grundy.

JUDGES.

CHARLES BLANCHARD, Ottawa, Illinois.
HARVEY M. TRIMBLE, Princeton, "
SAMUEL C. STOUGH, Morris, "

Fourteenth Circuit.—The counties of Rock Island, Mercer, Whiteside and Henry.

JUDGES.

HIRAM BIGELOW, Galva, Illinois.
WILLIAM H. GEST, Rock Island, Illinois.
FRANK D. RAMSEY, Morrison, "

Fifteenth Circuit.—The counties of Jo Daviess, Stephenson, Carroll, Ogle and Lee.

JUDGES.

JOHN D. CRABTREE, Dixon, Illinois.
JAMES SHAW, Mount Carroll, "
JAMES S. BAUME, Galena, "

Sixteenth Circuit.—The counties of Kane, DuPage, DeKalb and Kendall.

JUDGES.

HENRY B. WILLIS, Elgin, Illinois.
CHARLES A. BISHOP, Sycamore, Illinois.
GEORGE W. BROWN, Wheaton, "

Seventeenth Circuit.—The counties of Winnebago, Boone, McHenry and Lake.

JUDGES.

JOHN C. GARVER, Rockford, Illinois.
CHARLES E. FULLER, Belvidere, Illinois.
CHARLES H. DONNELLY, Woodstock, Illinois.

COURTS OF COOK COUNTY.

The State constitution recognizes Cook county as one judicial circuit, and establishes the Circuit and Superior Courts of said county. The Criminal Court of Cook County is also established with jurisdiction of a Circuit Court in criminal cases only. The judges of the Circuit and Superior Courts are judges, *ex-officio*, of the Criminal Court.

CIRCUIT COURT.

CLERK—John A. Cooke, County Building, Chicago.

JUDGES.

EDWARD F. DUNNE,
MURRAY F. TULEY,
RICHARD S. TUTHILL,
FRANCIS ADAMS,
ARBA N. WATERMAN,
ELBRIDGE HANEY,
OLIVER H. HORTON,

JOHN GIBBONS,
RICHARD W. CLIFFORD,
THOMAS G. WINDES,
EDMUND W. BURKE,
CHARLES G. NEELY,
FRANK BAKER,
ABNER SMITH.

SUPERIOR COURT.

CLERK—John A. Linn, County Building, Chicago.

JUDGES.

HENRY M. SHEPARD,
THEODORE BRENTANO,
PHILIP STEIN,
WILLIAM G. EWING,
JONAS HUTCHINSON,

ARTHUR H. CHETLAIN,
HENRY V. FREEMAN,
JOHN BARTON PAYNE,
NATHANIEL C. SEARS,
FARLIN Q. BALL,
JOSEPH E. GARY.

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CASES
IN THE
APPELLATE COURTS OF ILLINOIS.

FIRST DISTRICT—MARCH TERM, 1897.

Michael C. McDonald v. Fort Dearborn National Bank.

1. *TRIALS—Arguments of Counsel.*—Much latitude must be allowed to counsel in their arguments to a jury, and it is only in cases where it is plain that injustice has resulted from them, that judgments will be reversed because of statements made in an argument.

2. *SAME—Remarks by the Court in Regard to the Evidence.*—The credibility of witnesses is solely for the consideration of the jury, and it is highly important that the trial judge should not, in anything said by him in the presence of the jury, usurp the functions of that body.

Assumpsit, on a promissory note. Appeal from the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Heard in this court at the March term, 1897. Reversed and remanded. Opinion filed June 14, 1897.

A. B. JENKS and EDWARD MAHER, attorneys for appellant.

FLOWER, SMITH & MUSGRAVE, attorneys for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The appellant was a member of a copartnership firm, composed of one Michael J. Tierney and himself, doing business as M. J. Tierney & Co., "in the manufacture, buying and selling of all goods relating to machinists' supplies and everything to said business belonging."

In the articles of such copartnership, dated July 1, 1889, it was agreed that one Edward S. McDonald should represent the interest of appellant in the firm, and should act at all times as the agent of appellant in the management of the business, and sign all checks, notes, drafts and acceptances relating to said business.

About a year after the formation of that partnership, and while it was continuing to do business, another partnership known by the name of the Globe Steam Heating Company was formed by the said Michael J. Tierney, the said Edward S. McDonald and one B. B. McGinn, for the purpose of "manufacturing, constructing, repairing and selling steam and hot water heating and ventilating apparatus." It is not claimed that the appellant was in any way connected with the last named partnership.

On or about May 27, 1892, the said Edward S. McDonald executed in the said firm name of M. J. Tierney & Co., and delivered to the appellee the promissory note sued upon, in renewal of a former note, which we assume—although we do not observe in the abstract any positive evidence of the fact—was executed by said Edward S. McDonald in the same firm name.

To this suit upon said note, dated May 27, 1892, brought against appellant and said Tierney, as copartners, under said firm name of M. J. Tierney & Co., the appellant, besides the general issue, pleaded specially, denying his joint liability with said Tierney upon the alleged cause of action, and also denying that he made and delivered, or consented to or authorized the making and delivery of, or signed or authorized or consented to the execution of the note.

We refrain, as we should do if we reverse the judgment, from expressing any opinion of our own upon the weight of the evidence, but the effect of the evidence was to make the question an exceedingly close one whether appellee was not bound with notice and knowledge at the time it discounted the note, that it was given for the purposes and in the course of the business of the Globe Steam Heating Company (in which the appellant was not concerned), and

not for any purpose of the firm of M. J. Tierney & Co., in which appellant was a partner, and was paper which said Edward S. McDonald had no authority or right to make in said firm name.

The observance, therefore, by the trial court of the rules that require such questions of fact to be left to the jury, uninfluenced by any views of his own upon such issues, was plainly demanded.

The trial, for causes that do not need to be repeated, appears to have been a heated one; and during the closing argument to the jury by counsel for the appellee, the following occurred:

“Counsel for Appellee: May it please the court, and gentlemen of the jury—there are certain classes of men, gentlemen of the jury, to deal with whom is extremely dangerous. There are certain classes of men from whom it is very difficult to recover upon a promissory note made for money loaned. We have got such a case here.

Mr. Maher (for appellant): I object to that statement and take an exception.

The Court: What statement?

Mr. Maher: He is talking about people being a dangerous class of men to recover from, and that is the kind of men he has got to deal with here, and we take an exception.

Mr. Jenks (for appellant): He said on a promissory note.

The Court: The court can not see what this is going to lead up to. If there be sufficient for that statement in the proof, I do not see why it should not be made. I suppose this is why counsel opens in the way he does.

Mr. Maher: Well, we take an exception.

Mr. Smith (continuing): Among them are men who will go onto the witness stand, at the instance of their own attorneys, and shamelessly—not apparently having conscience enough to know what they are doing—swear to a jury in defense of a promissory note that, on another occasion, he signed and swore to a bill, or signed a bill which he understood was to be used as a sworn bill, signed the affidavit, and never took the pains to read what he was swearing to.

Mr. Maher: If your honor please, we again take exception to that statement, especially to that part of the statement which says that the defendant in this case went on the stand at the instance of his own attorneys.

The Court: I hope counsel will not persist in these interruptions. In my opinion this statement made by counsel is fully warranted by the evidence.

Mr. Maher: We want an exception.

The Court: Yes.

* * * * *

Mr. Smith (continuing): If you gentlemen have lived in the city of Chicago a great many years and know anything about the reputation of some of our prominent citizens—of course I do not refer to anybody who is a defendant in this case—you can readily see why he did not want to be known as contracting with the school board of the city of Chicago.

Counsel for the defendant here entered an exception to the last remark of plaintiff's counsel."

In justification of such remarks by counsel for appellee as are not supported by the evidence, or the fair inferences to be drawn from it, he properly says that "matters of common and general information can be commented upon with entire propriety," citing Ency. of Pl. and Pr., Vol. 2, p. 736, Par. 6, and State v. Phillips, 117 Mo. 389; and adds, as his own: "If the matters referred to in this statement were not of common and general information, they could have had no meaning to the jury, and would therefore be harmless."

We must not be understood to assent to such a conclusion. But we would not reverse the judgment because of what counsel said. Much latitude must be allowed to counsel in their *ex tempore* arguments to a jury, and it is only in cases where it is plain that injustice has resulted from them that judgments will be reversed because of them.

It is, however, of the highest importance that the trial judge should not, in anything said by him in the presence of the jury, usurp the functions of that body.

Following immediately upon one of the exceptions entered by counsel for appellant to the remarks of counsel for appellee, that the appellant—for he was the only person who had gone upon the witness stand at the instance of his attorneys, and testified as to the signing and swearing to a bill in equity filed by himself—had testified shamelessly and without apparent conscience to matters in his defense—the court ruled and said what to the jury could scarcely have meant anything less than a concurrence by the court in the remarks and inferences of the counsel. The effect upon the jury of that ruling and remark must almost necessarily have been seriously prejudicial to the appellant. To a person skilled in grammatical rules, as applied to the interpretation of sentences and their context, the remark by the court would probably be construed to apply only to the statement that appellant had gone upon the witness stand at the instance of his own attorneys, and would be harmless.

But remembered by the jury after they had heard the rest of the argument, and the instructions, and had retired to the jury room, its effect could scarcely be less than an impeachment by the judge himself of the credibility of the testimony of the appellant who was the object of so much severity of argument.

The credibility of appellant as a witness was something that the judge might not pass upon, but was solely for the consideration of the jury. We have no doubt that the learned trial judge, knowing the rule, had no intention of going beyond it in what he said, but the question is not what he meant, but is, what did the jury think he meant?

The evidence upon the main issue was so close, if appellant's testimony might be considered by the jury uninfluenced by what the judge said in their presence, that for the court to eliminate it from the case or to discredit its credibility, was enough to decisively change the scale of preponderance and weight.

Upon the record as made we are clear that another trial of the case should be had.

The point is made that we may not consider the record

because of the neglect of appellant to argue and urge to the trial court his reasons for a new trial. The bill of exceptions shows explicitly that the only ground upon which we have based our holding that another trial should be had, was one that was included as a reason for a new trial in the court below, and was there brought to the attention of the trial judge and was considered by him in, at least, the respect of how the grounds for it should be made to appear.

It has never been held that a better argument in an Appellate Court than was made in the court below, was alone a sufficient reason for affirming or for reversing a judgment.

The judgment will be reversed and the cause remanded.

Chicago and Erie Railroad Co. v. Jacob Binkopski.

1. APPELLATE COURT PRACTICE.—*Motions Must be in Writing.*—Rule 16 of this court requires that "all motions shall be in writing," and this rule not having been complied with, appellee's argument on his motion to dismiss this appeal can not be considered.

2. INSTRUCTIONS—*Accuracy Required.*—An instruction as to the measure of damages in a personal injury suit should limit the jury in assessing damages to the consideration of injuries resulting from the negligence complained of, and where a plaintiff is suffering from two injuries, for one of which the defendant is in no way responsible, the results of which are hard to separate, an instruction allowing the plaintiff damages for physical pain, mental anguish, pecuniary loss and permanent disability without limitations as to the cause thereof is erroneous.

3. TRIALS—*Misconduct of Counsel.*—The court thinks that the conduct of appellee's counsel was calculated to excite a prejudice in the minds of the jurors against the defense and that the trial court should not have allowed it to pass without reprimand, but should have checked all language and conduct of counsel calculated to make the trial other than fair and free from prejudice.

4. SAME—*Passion, Prejudice or Misconception of Jury not Corrected by Remittitur.*—When a verdict is so flagrantly excessive as to be only accounted for on the grounds of prejudice, passion or misconception, a remittitur does not render the verdict a wholesome one, and it should not be allowed to stand.

Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. FARLIN Q. BALL, Judge, presiding.

72	22
79	201
73	22
82	542
72	22
89	396
72	22
104	4 68
104	*141
105	*470
72	22
107	*406

C. & E. R. R. Co. v. Binkopski.

Heard in this court at the March term, 1897. Reversed and remanded. Opinion filed July 15, 1897. Rehearing allowed and cause reheard at the October term, 1897. Reversed and remanded. Opinion filed December 16, 1897.

W. O. JOHNSON, attorney for appellant; STIRLEN & KING, of counsel.

EDGAR TERHUNE, attorney for appellee.

MR. JUSTICE WINDES DELIVERED THE OPINION OF THE COURT ON REHEARING.

Appellee recovered a verdict for \$15,000 before a jury in the Superior Court, for personal injuries, on which, after a remittitur of \$10,000 by appellee, said court entered judgment for \$5,000, from which this appeal is prosecuted.

At the March term, 1897, of this court, said judgment was reversed (opinion July 15, 1897,) because of error, as shown by the abstract, in giving an instruction on behalf of plaintiff. It appeared, for the first time, on petition for a rehearing, that no such instruction was in fact given; that said instruction, though appearing by the abstract to have been given, was wrongfully there, and was not contained in the record. Counsel on both sides had failed to call the attention of the court to the error in the abstract, and as error was assigned on this instruction, it resulted in the reversal without a consideration of other instructions or questions in the case, except a peremptory instruction to find for defendant. Counsel should use more care to see that correct abstracts are presented, or the court may, in future, exercise its privilege of refusing a rehearing because of fault in this regard. It is no excuse for appellee's counsel that error assigned is not argued by appellant. It may be that such error may be considered by the court as waived, still, where it is apparent, the court is justified in considering it, particularly in case of a reversal, so that it may be avoided on a second trial.

In this case a rehearing was allowed because the misleading abstract was prepared by appellant's counsel, and

we have fully reconsidered the case in the new light presented.

Appellee in his brief presents and argues a motion to dismiss this appeal, because, as he claims, no duly authenticated copy of the record of judgment or transcript thereof, as provided by statute, was filed in this court.

A true, perfect and complete transcript of the record in this cause in said Superior Court, according to the certificate of the clerk of that court, was filed on March 11, 1897, in this court, pursuant to a written motion of appellant supported by affidavit filed on the same day, and pursuant to an order of this court.

Appellant had theretofore, on March 3, 1897, which was the second day of March, 1897, term of this court, filed in this court certified copies of the order of judgment of said Superior Court in said cause, and of the appeal bond showing an appeal to this court from said judgment. This motion, if sustained, would prevent the consideration by this court of the merits of this appeal. Rule 16 of this court requires that "all motions shall be in writing and filed with the clerk, together with the reasons in support thereof; and a copy of said motion, and also of the affidavits on which the same is founded, shall be served on the opposite party or his attorney, at least one day before they shall be submitted to the court. Objections to motions must also be in writing."

No motion in writing has been filed in this court to dismiss the appeal, and therefore the motion argued by appellee in his brief will not be entertained, especially as it does not go to the merits of the cause.

Appellee was employed by appellant assisting in repairing cars in its yard in Chicago, and was injured through the alleged negligence of appellant.

The negligence that the evidence had a tendency to support consisted in appellant permitting a hole from six to ten inches deep in the ground close to one of its tracks in said yard to be and remain unfilled, into which appellee, without seeing it or knowing of its existence, stepped and lost

his balance, and staggered or fell against a passing car and was thrown down, run upon and dragged by the car.

Appellant claims appellee was guilty of contributory negligence in not keeping as careful a lookout for passing cars as he should; that he was employed to work in the yard where cars were known to be passing very frequently and liable to come upon him at any time; that this danger was an ordinary hazard of his employment, which appellee assumed, and also that appellant was guilty of no negligence.

After a careful review of the evidence on these points, we are of opinion that under all the circumstances disclosed by it, these were questions of fact for the jury, and since the case may be submitted to another jury, we refrain from a discussion of the merits of appellee's case. Illinois C. R. R. v. Campbell, 58 Ill. App. 275; Chicago & E. I. R. R. v. Hines, 132 Ill. 169; Porter v. Hannibal & St. J. R. R., 60 Mo. 160; Meek v. New York C. & H. R. R. R., 69 Hun, 488; Babcock v. Old Colony R. R., 150 Mass. 471.

The trial court gave to the jury for appellee, against objections by appellant, the following instruction, to wit:

"The court instructs the jury that the defendant in this case was at the time and place of the alleged accident to the plaintiff bound to exercise reasonable care to furnish and maintain a reasonably safe road-bed, in its railroad yards, and that the plaintiff at the time and place of the alleged accident, and in the absence of any knowledge on his part to the contrary, had the right to presume that the defendant had discharged its duty in that behalf; and if the jury believe from the evidence that at the time and place of the alleged accident to the plaintiff, the defendant had for an unreasonably long time theretofore negligently permitted to exist and remain in the said yard, a certain hole, or negligently made said hole, and if the jury further believe from the evidence that the said hole was so situated and located, and was of such a character as to be at the said time and place of said accident an unsafe and dangerous hole, and if the jury believe from the evidence that the

defendant had notice of the existence of said hole as aforesaid, or that the said hole had existed for such a length of time that the said defendant in the exercise of due and ordinary care could have known of the existence of said hole, and could have repaired said hole, in the exercise of due and ordinary care, before said alleged accident, and negligently failed to do so, and that by reason of the existence of said hole as aforesaid, the said plaintiff without notice or knowledge of said hole and the existence thereof, and while in the discharge of his duty and while in the exercise of ordinary and reasonable care for his own safety, did at the time and place of the alleged accident declared upon in the declaration on file herein, without fault on his part, step his foot into the said hole."

"And if the jury believe from the evidence that thereby and because thereof the said plaintiff fell between or under the cars of the said defendant, and was thereby and because thereof injured as declared upon in the said declaration, then the jury may find the defendant guilty and assess the plaintiff's damages at such sum as it believes from the evidence to be the just compensation for the physical pain and suffering the plaintiff has undergone, if such pain and suffering appear from the evidence; for the mental anguish the plaintiff has suffered, if such mental anguish appear from the evidence, for the pecuniary loss of the said plaintiff, if such pecuniary loss appear from the evidence, and for the permanent disability of the said plaintiff, if any such permanent disability appear from the evidence."

There was evidence before the jury that appellee had received another injury, about four months prior to the injury in question in this case, which confined him to his bed for two months, caused a lameness in his left foot, and he could not do the same work after, that he could before this injury. The evidence is not at all clear that the injury of January 7, 1893, for which this suit is brought, was the sole cause of appellee's impairment of capacity at the time of the trial. The surgeons who testified for appellee, said that they didn't see him until just before the trial, and one

of them, Dr. McIntire, testified that both thighs of appellee appeared to have been injured, and that he could only determine from his examination what appellee's condition then was. Appellee testified that both his legs were hurt and caused him pain; that one leg was hurt before January 7, 1893; that at the time of the trial both his legs pained him if he walked about for one-half hour; that he had to stop; that he couldn't walk any further. He made no distinction as to whether he suffered from the one or the other injury. Appellee's daughter testified that he had pains inside of him, and he was not well in that foot before January 7, 1893; that he was always lame on account of that foot; that he could walk better then, and the company gave him easier work; that now he walks coming and going from the court every day to and from the cars; that he walks slow to church, which is seven blocks; that before January 7, 1893, he walked without a stick, but that it pained him; that now (time of trial), he can't move without a stick.

Appellee also voluntarily, in presence of the jury, pointed out the scars and injuries caused prior to January 7, 1893, as also those which were caused on that day, and his counsel then stated that the one he was going to make the most of looked the least serious.

This being the evidence with regard to the two injuries, it was almost impossible for the jury to separate his condition before January 7, 1893, from his condition after that date; but even if this could be done, in view of the fact that appellee exhibited to the jury the scars and marks of both injuries, still it was highly important that the jury in their assessment of damages should have been directed to consider only the injuries received January 7, 1893, and the results thereof in way of physical pain and suffering, mental anguish, pecuniary loss and permanent disability, limiting these several elements of damages as arising from the injuries received at that time.

This instruction does not limit the jury in assessing appellee's damages to injuries received January 7, 1893, as it should have done particularly in view of the fact of there

being before them evidence of the prior injury quite serious in its nature. *Illinois Central R. R. Co. v. Cole*, 165 Ill. 334; *Peoria Bridge Ass'n v. Loomis*, 20 Ill. 235; *Chicago, B. & Q. R. R. Co. v. Hines*, 45 Ill. App. 299.

The fact that the jury were not so limited may, in some degree, account for the very large verdict rendered in this case, two-thirds of which was remitted before judgment. The criticism of appellant's counsel on this instruction, to the effect that it prescribes a different degree of care and diligence for appellant than for appellee is, we think, not well founded. The cases cited in support of that contention are cases in which the parties were practically in the same situation as to duty and knowledge of the particular defect in question. In the case at bar, appellee was charged only with the duty to exercise ordinary care for his own safety. It was no part of his duty to have any special lookout for holes in the freight yard, whereas it was the duty of appellant to exercise reasonable care to furnish him a reasonably safe place in which to do his work, and in order to perform that duty, it was bound to exercise reasonable care to originally construct, and reasonable care to maintain, its yards and tracks in a reasonably safe manner. What would be reasonable care on appellee's part, in the performance of his regular duties, in looking out for his own safety, in no way connected with the construction or care of the yards, is very different from what would be reasonable care on the part of appellant in the performance of a special duty to do the particular thing, to wit, to see that there were no dangerous holes in its freight yard. There is also evidence that there was a fresh fall of snow on the ground, which wholly covered the hole which it is alleged caused the accident, and that the hole had been in the yard for months before the accident.

The trial court refused to give the following instruction asked by appellant, to wit:

"You are instructed that the defendant was not bound to furnish a track or road to plaintiff which was absolutely safe, or free from defect. All the defendant was bound to

do was to furnish a road reasonably safe, and to use ordinary care to see that it was kept free from defects, and if you believe from the evidence that the road-bed at the time when, and at the place where the plaintiff was injured, was reasonably safe, and that the defendant used ordinary care to keep it free from becoming defective, then the plaintiff can not recover, even though it may have, in fact, become unsafe, and your verdict must be for the defendant. Likewise if you believe from the evidence that the said road-bed at the place plaintiff was injured, had been properly constructed, but had since become, and was, at the time of plaintiff's injury, unsafe, still the plaintiff can not recover, if you believe from the evidence that the defendant used ordinary care to have said road-bed inspected, and had no actual knowledge of its defective condition, long enough before the plaintiff was injured, to have repaired the same; and in that case your verdict must be for the defendant."

This instruction, even if in other respects good, as to which there is doubt, should not have been given, because there does not appear to have been any evidence that appellant caused any inspection whatever to be made of its yards at any time prior to appellee's injury on January 7, 1893. There is evidence that there were many persons whose duty it was to inspect appellant's yards and report anything out of order, but none that any of these persons did in fact perform that duty.

The evidence did not show any facts tending to show that appellee's injury was caused by the negligence of a fellow-servant, and therefore appellant's instructions in that regard were properly refused.

It appears that a witness, Coughlin, testified on behalf of appellant, that he was a yard master, and had worked in the railroad business twenty-nine years in the employ of various roads, and had traveled every yard in Chicago for four years. He was then asked this question: "Do you know what the usual condition of road-beds of yards was in the city of Chicago during the month of January, 1893?" which question was objected to by plaintiff as immaterial.

The objection was sustained, and exception taken by defendant. The abstract shows nothing further than that there was argument of counsel on said objection, but fails to show what, if anything, it was desired or expected to be proved by this witness in this connection. We are therefore unable to tell, in the absence of an offer or statement by counsel, what he expected to prove by this witness in answer to the question propounded. There was no error in sustaining the objection. *Howard v. Tedford*, March term, Opn. July 29, 1897, and cases there cited; *Berkowsky v. Cahill*, page 101, this volume, and cases cited.

Appellant claims the judgment of \$5,000 is excessive; that the fact there was a verdict of \$15,000, from which there was a remittitur of \$10,000, shows the jury was actuated by passion and prejudice, and that this passion and prejudice was induced by improper remarks and conduct of counsel for appellee during the progress of the trial. It appears that appellee's counsel, from time to time during the trial, and while the evidence was being adduced, in the presence of the jury, made use of language insinuating that the defense was keeping a Dr. Sullivan, who attended appellee immediately after his injuries, from attendance upon the court; that certain of defendant's witnesses were not testifying truthfully; that appellee's counsel openly charged that objections were made by defendant's counsel on cross-examination of defendant's witness, for the purpose of giving a cue to the witness; that the date of a certain statement of a witness called by appellee, which was produced by defendant's counsel on his cross-examination, and purporting to have been made June 18, 1896, about one month before the trial, was written so recently that the ink was wet, thus indirectly charging appellant's counsel with an attempt to deceive.

At no time does the language of appellee's counsel, from anything in the record, appear to have been justified by any act or statement of appellant's counsel, or of any one connected with the defense. The trial court in some instances sustained objections of appellant's counsel to the conduct of

appellee's counsel, above noted, but at no time did the court in any way reprimand him, and we think it was calculated to make an impression with the jury tending to excite a prejudice in the minds of the jurors against the defense. We think the trial court should not have allowed the language and conduct of appellee's counsel to pass without reprimand. It should have prevented, by prompt rulings and reprimand, if necessary, all language and conduct of counsel calculated to prejudice the minds of the jury. This question was very fully and carefully considered by this court in the case of *W. C. St. R. R. Co. v. Johnson*, 69 Ill. App. 151, in which there was a remittitur of one-half the verdict, and the court said: "When a verdict for \$20,000 in a personal injury case is tainted by something which vitiates it to one-half its extent, it is a serious question if its other half may be ripened into a wholesome judgment—whether the vice that contaminated it to the extent of one-half did not permeate and invalidate the whole." The judgment was reversed because there was so much in the record which was prejudicial to a cool and deliberate verdict.

The Supreme Court also, in *Loewenthal v. Streng*, 90 Ill. 74, where there was a remittitur of \$4,000 from a verdict of \$10,000 in a case of malicious prosecution, said, speaking of the verdict: "When it is so flagrantly excessive as to be only accounted for on the grounds of prejudice, passion or misconception, the remittitur does not remove the prejudice, passion or misconception. These elements may have entered, and probably did enter, into the finding of other facts important to the issue, if not the issue itself. Such feelings would naturally lead to an unfair finding against appellant." The judgment was reversed.

This language of the Supreme Court is peculiarly applicable to the case at bar, in which there was a strong conflict in the evidence as to the existence of the hole which it is claimed was the cause of appellee's injury. If the minds of the jurors were prejudiced against the defense by the language and repeated insinuations of appellee's counsel, and we think that was so, then there was not that cool and de-

liberate consideration of the evidence as to the vital issue in the case, to wit, appellant's liability on account of negligence, that should be had in every case. It does not appear from the record whether appellee voluntarily remitted \$10,000 from the verdict; his counsel in his brief said it was required by the court before it would enter judgment, but we think this is not very important. The amount of the verdict—considering the injuries of appellee, shown to be on two separate occasions, one in no way connected with appellant—the failure of appellee's instructions to confine the damages to the injury of January 7, 1893, the conduct of appellee's counsel during the trial, and the remittitur made, show quite clearly that the verdict was vitiated by either passion, prejudice or misconception of the jury. We think the remittitur does not render the judgment a whole-some one, and it will be reversed and the cause remanded by reason of the errors noted.

Reversed and remanded.

72	32
82	521
72	32
90	857

Gormully & Jeffery Mfg. Co. v. Otto Olsen.

1. **MASTER AND SERVANT—Duty of Master as to Machinery.**—An instruction that it is the duty of a master to provide reasonably safe and suitable machinery for his employes is erroneous, as a master is only bound to use reasonable and ordinary care and diligence in providing suitable and safe machinery.

2. **PRACTICE—Errors Not Presented on Motion for a New Trial are Waived.**—Errors not presented to the trial court on motion for a new trial, are waived and will not be considered on appeal.

3. **NEGLIGENCE—Removal of Defective Machinery Not Evidence of.**—In an action by a servant against his master for injuries caused by defective machinery, it is not proper to allow the plaintiff to show that a defective wheel which caused the accident was removed soon after it occurred.

Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Heard in this court at the March term, 1897. Reversed and remanded. Opinion filed August 5, 1897.

Gormully & Jeffery Mfg. Co. v. Olsen.

FRANKLIN DENISON and JOHN A. JAMESON, attorneys for appellant.

HARRY OLSON, attorney for appellee; D. M. KIRTON, of counsel.

MR. JUSTICE WINDES DELIVERED THE OPINION OF THE COURT.

Appellee, an employe of appellant, a manufacturer of bicycles, recovered a judgment of \$2,000 for personal injuries received by him while running a milling machine, in appellant's factory, which had a defective wheel.

The declaration, which contained eight counts, alleges in the first count that appellee was employed to do general work about the factory of appellant, but not to operate machinery; that he was specially directed to operate the milling machine; that it was the appellant's *duty to furnish reasonably safe machinery, and to provide said machinery with reasonably safe wheels*; that appellant neglected its duty, and negligently provided an unsafe wheel, having a portion of its circumference broken out; that by reason of this defect, while appellee was operating said machine, and in the exercise of due care and caution, the injury to appellee was caused. The third count, in addition to these allegations, alleged that appellee was inexperienced in the use of machinery, and ignorant of the dangers arising from any defect therein. The fourth count, in addition, alleged that appellant knew of the defect and dangers; that it should have informed appellee of dangers, but did not. The other counts do not differ materially from the first, third and fourth. The declaration is sufficient to sustain a judgment. The duty of the defendant, if any, arises from the facts alleged and proved, and the allegation in that regard is surplusage.

The fourth instruction given for appellee is erroneous, in that it tells the jury it was appellant's duty to *provide reasonably safe and suitable machinery* for its employes, whereas the instruction should have been that appellant's duty was to use *reasonable and ordinary care and diligence in provid-*

ing suitable and safe machinery. Weber Wagon Co. v. Kehl, 139 Ill. 644; Chicago & E. I. R. R. Co. v. Kneirim, 152 Ill. 461.

This error, however, was waived by not being presented to the trial court in the motion for a new trial. Emory v. Addis, 71 Ill. 273; Jones v. Jones, 71 Ill. 562; Ottawa, O. & F. R. V. R. R. Co. v. McMath, 91 Ill. 104-111; Calumet El. St. Ry. Co. v. VanPelt, 68 Ill. App. 585.

There was a strong conflict of evidence, both as to the care of appellee and the negligence of appellant, the details of which it is unnecessary to set out, the court being of opinion, after a careful examination of the record, that the case is one which should be submitted to the jury on these points.

Against the objection of appellant, the trial court allowed testimony on behalf of appellee, and on cross-examination of appellant's witnesses, to the effect that the defective wheel which caused the injury was taken out of the machine by appellant's servant soon after the accident and on the same day it occurred, and that the order to take it out was given by appellant's foreman. Later the court, on motion of appellant's counsel, struck out the testimony that the order was given by the foreman, but allowed that part to go to the jury showing that appellant's servant took out the defective wheel.

This ruling of the court was error, and, we think, in view of the fact of the strong conflict of evidence in the case on the question of appellant's liability, prejudicial. This evidence was calculated to have great weight with the jury, as tending to show an admission of negligence by appellant, whereas it should be encouraged, in case of an accident, at once to remedy the defect which caused the accident, and not be confronted by the possibility of having its acts in that regard construed as a confession of negligence. Hodges v. Percival, 132 Ill. 53, and cases cited; City of Bloomington v. Legg, Admr., 151 Ill. 9-15; Morse v. Minneapolis & St. L. R. R. Co., 30 Minn. 468, and cases cited; Nalley v. Hartford, etc., Co., 51 Conn. 524.

For the error last noted the judgment will be reversed and the cause remanded.

Rutan v. Lagonda Nat. Bank.

F. C. Rutan v. Lagonda National Bank.

72	35
80	30
72	35
d106	*414

1. **COURTS**—*The Statute in Regard to Place of Meeting Construed.*—What is meant by the statute in regard to the places in which the courts of the various counties of the State shall meet, is that said courts shall be held in the public court house or public court houses provided by the authorities for the holding of court, and commonly known and designated as the place or places set apart for such purpose; and the practice prevailing in Cook county of transacting a part of the business of the civil courts in what is known as the "Criminal Court building" is perfectly legal and proper.

2. **INJUNCTIONS**—*Power to Approve Bond Can Not be Delegated.*—The statute plainly requires that in all cases in which bonds are required as a condition precedent to the issuing of a writ of injunction, the surety shall be approved by the court, judge or master granting or ordering the injunction, and this duty can not be delegated to the clerk. And where the court orders that a bond be given, a bond approved by the clerk is not sufficient to support the injunction and it will be set aside on appeal.

Injunction.—Appeal from the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Heard in this court at the March term, 1897. Reversed and remanded. Opinion filed October 11, 1897.

ALDRICH, REED, FOSTER & ALLEN, attorneys for appellant.

FARSON & GREENFIELD, attorneys for appellee.

PER CURIAM.

This is a suit brought by the complainant, the Lagonda National Bank, a citizen of the State of Ohio, against Allan R. Jewett, Isaac M. Sowers, Frank C. Rutan and W. B. Pummill, all the Safety Deposit Vault Companies of Chicago, James N. Young and James N. Young & Company, in the nature of a creditor's bill, founded upon a judgment against the first four parties named, and praying for an injunction restraining the said four parties from disposing of, transferring, assigning or encumbering any real estate in

their hands, and from collecting any debts due to either of them, including money deposited in any bank, and from drawing or removing any money or papers from any safety deposit vault in the city of Chicago, and from assigning and transferring or surrendering property of any kind or description belonging to either of them, or from surrendering or assigning any policy of insurance upon their lives. The bill further prays that Frank C. Rutan may be enjoined from selling, assigning, incumbering, etc., the certain shares of stock of James N. Young & Co., alleged in the bill upon information and belief to belong to him, and that the said company be restrained from transferring said stock upon its stock books; and that the Safety Deposit Vault Companies be restrained from allowing the defendants Jewett, Sowers, Rutan or Pummill, or any or either of them, to take from or remove from their said vaults any papers, money or effects of whatever character.

Attached to this bill were the following affidavit and indorsements:

"STATE OF ILLINOIS, }
Cook County. } ss.

On the eleventh day of March, one thousand eight hundred and ninety-seven, personally came before me C. W. Greenfield, who, being duly sworn, saith that he is the attorney and solicitor of the Lagonda National Bank, the above named complainant; that he has read the foregoing bill of complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters and things therein stated to be upon information and belief, and as to these matters he believes it to be true.

C. W. GREENFIELD.

Subscribed and sworn to before me this 27th day of March, A. D. 1897.

BENJAMIN F. LANGWORTHY,
Notary Public.

I have examined the foregoing bill and affidavit and recommend that an injunction issue as prayed.

EDWARD A. DICKER,
Master.

Rutan v. Lagonda Nat. Bank.

Let a writ of injunction issue restraining the defendants, as prayed in the bill of complaint, on complainant giving bond conditioned as provided by law in the sum of five hundred dollars, with surety to be approved by the clerk of this court.

JOHN GIBBONS, Judge.

Master's fees, \$5.00. Paid by Compl't.

E. A. DICKER, Master."

The injunction was issued without notice to any or either of the defendants, as prayed for in the bill of complaint, and from the order granting the injunction the defendant, Frank C. Rutan, has prayed a several appeal and perfected it in this court. The order was made by his honor, Judge Gibbons, while assigned to the Criminal Court of Cook County, and under circumstances which have not yet been passed upon by this court. Judge Gibbons had made it his custom while presiding in the Criminal Court, to convene each morning in his Criminal Court room, in the Criminal Court building of Chicago, a branch of the Circuit Court, a minute clerk of the Circuit Court, and a deputy sheriff being present, and then to pass upon such civil motions as the attorneys presented, at the conclusion of which hearing he would cause the Circuit Court to be adjourned and proceed with the criminal business from the same bench. On the day upon which the order in this case was made, he, pursuant to this arrangement, heard a number of contested motions which would properly be upon his calendar while serving as a judge of a branch of the Circuit Court. This hearing took place in the Criminal Court building, in the room assigned to him as a judge of the Criminal Court, and it was during the call of these motions and pending the discussion thereof that he signed his name and the word "Judge" thereafter to the order entered in blank on the bill of complaint, which is the order appealed from. After the hearing of the contested motion calendar, having adjourned the Circuit Court, he turned his attention to his duties as judge of the Criminal Court, and conducted the business thereof pursuant to law.

It is insisted that because Judge Gibbons, by whom the injunction was issued, had, at the time of the action taken by him, been assigned to the Criminal Court, and was at the time of issuing the injunction actually in the Criminal Court building, he had no jurisdiction to issue the injunction.

Section 3 of an act to revise the law in relation to Circuit Courts, approved February 18, 1874, provides:

"The Circuit Courts of the several counties in this State shall be held in the court houses of such counties, except as otherwise provided by law; and the Superior Court of Cook County shall be held in the court house in the county of Cook, except as otherwise provided by law."

Section 2 of an act to revise the law in relation to the Criminal Court of Cook County, approved February 12, 1874, provides:

"The said court shall be held in the court house of the county of Cook, or in such other place at the county seat as may be provided therefor."

The contention of appellant in effect is, that the words of the statute, "the court house" must be construed as indicating but one court house, and that in the county of Cook all civil business must be transacted in the court house in which the majority of the civil business is transacted, from which it would follow that the criminal business must be transacted in the court house in which the principal part of the criminal business is transacted.

We do not think any such narrow interpretation is to be given to the law. What is meant by the statute is that the courts of record of this county shall be held in the public court house, or the public court houses provided by the authorities for the holding of court, and commonly known and designated to be used for such purpose.

Ever since the completion of the court house in the county of Cook, known as the Criminal Court building, a portion of the business of the civil courts has been transacted there. For a time all the sessions of the County Court were there held, and to this day a portion of the

business of that court is there transacted. So, too, since the completion of the present Criminal Court building, at least two of the judges of the Superior Court have had their regular rooms for the transaction of the business of that court in that building. Nor have, since the completion of the Criminal Court building, all criminal trials been held in the building known as the court house for the transaction of criminal business. The action of the public authorities charged with the duty of providing rooms for the holding of court, and of the courts, has been such that for many years courts for the transaction of civil business have been held in either of said court houses, as the convenience of the public and the necessities of the court might demand.

The case at bar is entirely different from that of *U. S. Life Insurance Co. v. Shattuck*, 57 Ill. App. 382; 159 Ill. 610. In the present case Judge Gibbons was not holding a session of the Criminal Court when he issued the injunction under consideration, but upon that morning, as was his custom each morning, he, as he properly might, and as other judges did, convened a branch of the Circuit Court for the transaction of civil business in the building known as the Criminal Court building. There were present a clerk of the Circuit Court and a bailiff, an officer of the sheriff of Cook county, so that in all respects the Circuit Court was properly convened and in session ready for the transaction of civil business.

It is also assigned as error that the court did not approve the surety on the injunction bond, but ordered that such surety should be approved by the clerk. The record shows that the bond was approved only by the clerk. The statute plainly requires that in all cases in which bonds are required as a condition precedent to the issuing of a writ of injunction, the surety shall be approved by the court, judge or master granting or ordering the injunction. 2 S. & C. Stat., Chap. 69, Secs. 8, 9 and 10.

In the case of an injunction to restrain the enforcement of a judgment, section 8 imperatively requires that the

complainant shall execute a bond to the plaintiff in the judgment. Section 9 is as follows: "In all other cases, before an injunction shall issue, the complainant shall give bond in such penalty and upon such condition, and with such security as may be required by the court, judge or master granting or ordering the injunction, *provided*, bond need not be given when, for good cause shown, the court, judge or master is of opinion that the injunction ought to be granted without bond."

The fact that in the present case the judge ordered that a bond should be given, is conclusive that it was not his opinion that the injunction ought to be granted without bond. The case, therefore, is one in which a bond was required by law. The clerk was not authorized by statute to approve the security, and the judge, whose duty it was, by the statute, to approve the surety, was powerless to authorize the clerk so to do. The statute of 1845 provided that, on appeals from the Circuit to the Supreme Court, the party appealing should "give bond with sufficient security, to be approved by the Circuit Court." Rev. Stat. 1845, Chap. 83, Sec. 47.

In *Abraham v. Huntington et al.*, 19 Ill. 403, and in *Henderson v. Fitch et al.*, *Ib.* 404, the court dismissed the appeals on motion, for the reason that the appeal bonds were not approved by the trial court, but by the clerk, expressly holding that the power vested in the court by the statute to approve an appeal bond, could not be delegated to the clerk.

Section 122 of the act of 1874, in relation to courts, is as follows:

"Appeals may be taken from the final orders, judgments and decrees of the County Courts to the Circuit Courts of their respective counties in all matters, except as provided in the following section, upon the appellant giving bond and security in such amount and upon such conditions as the court shall approve," etc.

The County Court granted an appeal, fixed the penalty of the bond and the time within which it should be filed,

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but ordered the clerk to approve the security, which he did. On motion the appeal was dismissed in the Circuit Court, and, on appeal to the Supreme Court, the judgment of the Circuit Court was affirmed, the Supreme Court holding that only the Circuit Court had power to approve the bond, and that it could not delegate that power to the clerk. *Bowlesville M. & M. Co. v. Pulling*, 89 Ill. 58.

We think it clear that if the defective bonds given in the cases cited were insufficient to support the appeals, the similarly defective bond in the present case is insufficient to support the injunction.

Order reversed and cause remanded.

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Emanuel Sondheimer et al. v. Joseph Graeser et al.

1. **APPEALS AND ERRORS**—*An Assignment of Errors Must be Good as to All who Join in it.*—An assignment of errors, like a pleading, must set forth errors which are available to all who join in it. If not good as to all, it is not good as to any.

2. **CHATTEL MORTGAGES**—*Who May not Set up Laches in Foreclosing.*—One who signs a replevin bond in a suit in which mortgaged goods are replevied from the mortgagee after he has taken possession under his mortgage, assists in preventing the foreclosure of the mortgage, and is estopped to say that the mortgagee has been guilty of laches in failing to foreclose.

3. **SAME**—*Corporation Organized by Mortgagors, not a Purchaser.*—The owners of mortgaged property do not become purchasers with a right to defend against the mortgage because it was not foreclosed at maturity by merely organizing themselves as a corporation and going through the forms of transferring the property to the corporation.

4. **SAME**—*Persons Controlling Corporation Making Mortgage, not Purchasers.*—Persons who constitute a majority of the board of directors of a corporation and control its business, and who are for all practical purposes the corporation, stand in no different relation to a mortgagee of the company's property than does the company, and can not defend against a mortgage because it was not foreclosed at maturity.

BILL, for the dissolution of a corporation and for a receiver. Appeal from the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed October 11, 1897.

BLUM & BLUM, attorneys for appellants.

BULKLEY, GRAY & MORE, attorneys for appellees.

PER CURIAM.

The William D. Gibson Company filed a bill in equity in the Circuit Court, making the Gassman Parlor Frame Company, Catherine Gassman, William Gassman, Fred C. Mueller, George Lesprance, Henry Sondheimer and Max Sondheimer defendants, alleging, among other things, that the Gassman Parlor Frame Co. was indebted to the complainant in the sum of \$103.66; that it was largely indebted to laborers and others; and that, in September, 1895, when it was insolvent, it fraudulently executed a judgment note for a large amount, and assigned its book accounts to E. Sondheimer & Co., etc.

The prayer of the bill was for a dissolution of the corporation, and for a receiver, etc. The other parties to this appeal, who were not originally made defendants to the bill, were subsequently made parties, and presented their claims by appropriate pleadings. The record discloses the following facts: Prior to the organization of the Gassman Parlor Frame Co. as a corporation, the Gassmans were manufacturing frames under the firm name of Gassman, Trumper & Co. June 22, 1894, Catherine Gassman, who seems to have been the owner of the property, executed to the order of Rees Brothers four promissory notes, one for the principal sum of \$2,055, due on or before July 1, 1895, and three for the sum of \$200 each, and due, respectively, on the first days of July, August and September, 1894, and to secure the payment of said notes executed a chattel mortgage of the machinery, fixtures, etc., in the manufacturing plant of the Gassmans. Rees Brothers assigned the notes and mortgages to James W. Garvy, and Joseph Graeser, one of the appellees, subsequently became the owner of the notes and mortgage by assignment from William J. Garvy, administrator of the estate of James W. Garvy. After the execution of the notes and mortgage, the Gassman Parlor

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Frame Co. was organized, and the plant of the Gassmans, including the mortgaged property, was transferred to the new corporation. The board of directors of the Gassman Parlor Frame Co. was composed of its officers, viz.: William Gassman, president; Max Sondheimer, treasurer, and Henry Sondheimer, secretary. Max Sondheimer, the treasurer, and Henry Sondheimer, the secretary, were sons of Emanuel Sondheimer, and Max was also a member of the firm of E. Sondheimer & Co., the other members of that firm being Emanuel Sondheimer and Moses Katz. The stock of the Gassman Parlor Frame Co. was divided into fifty shares of the par value of \$100 each, of which Henry Sondheimer held twenty-four and Max Sondheimer one share. That these twenty-five shares were, in fact, the property of E. Sondheimer & Co. is evident from the testimony of Max Sondheimer. He says the firm of E. Sondheimer & Co. furnished the Gassman Parlor Frame Co. lumber and all the money the company needed to do business; that they, E. Sondheimer & Co., backed the Parlor Frame Co., and, in consideration of that, the twenty-five shares of stock were given them. He also says that he went into the directory because the firm of E. Sondheimer & Co. had sold the Parlor Frame Co. all the lumber it used, paid its notes, and carried on its business, and that the Parlor Frame Co. was insolvent when he and Henry went into the directory. Henry Sondheimer testified that he had knowledge of most of the affairs of the Parlor Frame Co., as to its financial condition and standing, and that the business of that company was conducted with the money of E. Sondheimer & Co. September 16, 1895, the Gassman Parlor Frame Co., being then insolvent and indebted to E. Sondheimer & Co. to the amount of about \$3,386.45, William Gassman, the president of the company, being thereunto authorized by the company's board of directors, executed a judgment note to E. Sondheimer & Co. for the sum of \$3,128.88. Max Sondheimer explains the discrepancy between the amount due and the amount evidenced by the note, by saying that there were some items which, at the date of the note, had not been charged up in

the ledger of E. Sondheimer & Co. Also, September 16, 1895, the secretary of the Gassman Parlor Frame Co., acting in pursuance of a resolution of the board of directors of said date, assigned to E. Sondheimer & Co. all the outstanding accounts and debts due to the Gassman Company, as further security for its indebtedness to E. Sondheimer & Co. The resolutions of the board of directors authorizing the execution of the judgment note and the assignment of the accounts, were passed by the votes of William Gassman, president, and Henry Sondheimer, secretary, Max Sondheimer being present but not voting. Max at first voted in favor of assigning the accounts, but subsequently withdrew his vote. September 17, 1895, E. Sondheimer & Co. caused judgment to be entered in the Superior Court of Cook County on the judgment note above mentioned, sued out an execution on the judgment, and caused the same to be levied upon the property of the Gassman Parlor Frame Co., including the property described in the chattel mortgage assigned to Joseph Graeser, which property so levied on the sheriff took possession of, and appointed Henry Sondheimer as custodian thereof. While these proceedings were in progress a bill was pending in the Superior Court filed by William Garvy, administrator of the estate of James W. Garvy, deceased, for the foreclosure of the chattel mortgage in question, in which E. Sondheimer & Co. intervened, and, subsequently to the taking possession of the property levied on by the sheriff, Emanuel Sondheimer was appointed receiver in that suit, and, by order of the court, the sheriff turned over the property to him. September 27, 1895, the suit was dismissed, and the receiver in that suit then turned over the property to the receiver appointed by the Circuit Court in the present case. All of the property was sold by order of the court, and the proceeds of the sale, together with a small sum of money in the hands of the receiver, amounted to the sum of \$2,231.91. The court found that certain claims of laborers, amounting to the sum of \$666.78, were a first lien on the fund; that the chattel mortgage of appellee Graeser was a second lien, to the amount of \$2,400; and decreed that, after paying said

amounts, the receiver should pay from any funds in his hands the claim of E. Sondheimer & Co. The appellants assign as error the finding of the Circuit Court that the chattel mortgage owned by appellee Graeser was a valid lien, and giving it priority to the claim of appellant. Counsel for appellants says: "The question, and the only one which now arises in the cause, relates to the validity of the chattel mortgage."

It is not contended that there was not a good and valid consideration for the mortgage, or that it was not properly executed, acknowledged and recorded, nor that appellee Graeser is not the equitable owner.

The sole contention is that the mortgage was not foreclosed at maturity or within a reasonable time thereafter, and therefore it should be held void as against the claim of E. Sondheimer & Co., the appellants.

We are of opinion that appellants can not be regarded as *bona fide* purchasers, and that the decision in Reed v. Eames, 19 Ill. 596, cited by counsel, is not applicable to the facts in this case. The Gassman Parlor Frame Co. certainly could not complain of any *laches* or delay on the part of the mortgagee in foreclosing the mortgage, because the former owners of the mortgaged property, including Catherine Gassman, the mortgagor, did not become purchasers by merely organizing themselves as a corporation, and going through the form of transferring the property to the corporation. The corporation when formed was virtually controlled by appellants. The board of directors consisted of three, two of whom, as before stated, were Max and Henry Sondheimer, sons of Emanuel Sondheimer, Max being also a member of the firm of E. Sondheimer & Co. Appellants owned half the stock, and furnished, as Max and Henry Sondheimer testify, all the means to carry on the business. In view of these facts it may well be said that appellants were, for all practical purposes, the Gassman Parlor Frame Co., and so stood in no different relation to the mortgagee than did that company.

But there is an additional reason why appellant's counsel can not be heard to complain of delay in the foreclosure

of the mortgage. The mortgage contains the usual provision that on default being made in the payment of principal or interest, the whole amount may, at the option of the mortgagee, become at once due and payable. One of the notes secured by the mortgage being past due in August, 1894, John B. Rees and James Rees, the mortgagees, took possession of the mortgaged property, for the purpose of foreclosing the mortgage, when the Gassman Parlor Frame Co. replevied the goods, Emanuel Sondheimer, one of the appellants, executing the replevin bond as surety. Having thus actively assisted in preventing the foreclosure of the mortgage, he is estopped to say that appellee Graeser has been guilty of *laches* in failing to foreclose. And if he is estopped, so also are his co-appellants, who joined with him in the assignment of errors, the rule being that "an assignment of errors, like a pleading, must set forth errors which are available to all who join in it. If not good as to all, it is not good as to any." 2 Ency. of Pl. & Pr. 993, and cases cited.

At the time the replevin suit was commenced, the appellants were represented by a majority of the board of directors of the Gassman Company, and were then in control of and carrying on the business of the company, and we think it clear from the evidence that Emanuel Sondheimer, in executing the replevin bond, while acting nominally for the Parlor Frame Co. was in fact acting in the interest of and for E. Sondheimer & Co., and that the replevin suit was in fact commenced by E. Sondheimer & Co., in the name of the corporation.

The appellees assign as error the finding of the Circuit Court that the assignment by the Gassman Parlor Frame Co. to appellant, of its book accounts, etc., was valid as against other creditors. It does not appear from the evidence that there are any creditors other than the laborers, appellants and appellee Graeser, whose claims have not been paid, or that there is any person before the court interested as a creditor in the fund in the hands of the receiver, except appellants and appellee Joseph Graeser.

The decree is affirmed.

A. M. Bergevin v. Frank G. Barnard.

1. *PRACTICE—Affidavit for Continuance Held Not Sufficient.*—On a cause being called for trial on the first day of February, 1897, the defendant moved for a continuance and filed an affidavit in support of the motion in which it was stated that the defendant was absent in California and would not return until about the first day of March, 1897; that the suit was based on a gambling contract, that the defendant had a good and adequate defense to the suit, and that it would be dangerous for him to go to trial at that time. *Held*, on appeal, that a continuance was properly refused.

Transcript, from a justice of the peace. Appeal from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Heard in this court at the March term, 1897. *Affirmed*. Opinion filed October 11, 1897.

WILLIAM E. O'NEILL, attorney for appellant.

D. M. KIRTON, attorney for appellee.

PER CURIAM.

This suit was brought on the 29th day of July, 1895, before a justice of the peace in and for the county of Cook. The defendant did not appear at the hearing of said cause, and a judgment was rendered against him for \$197.50 and costs of suit; from which judgment the defendant appealed to the Circuit Court of Cook County.

When the cause was reached, on the 1st day of February, 1897, appellant moved the court to continue the same, and filed therein his affidavit for a continuance, in which he stated that the defendant was absent in California, and would not return until about the first day of March, 1897, and that the said suit was based upon a transaction on the open board of trade, and was a gambling contract, and that the defendant had a good and adequate defense to said suit, and it would be dangerous for the defendant to go to trial at that time. The court denied the motion, and the issues were submitted to a jury, who found a verdict for

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the plaintiff in the sum of \$214.72. The court refused to grant the defendant's motion for a new trial, and also his motion in arrest of judgment, and an appeal was prayed to this court. There was no testimony introduced at the hearing of said cause on behalf of the defendant.

The affidavit filed by appellant was clearly insufficient to entitle him to a continuance, and it does not appear from the record that any exception was taken to overruling the motion for a continuance.

We have examined the evidence presented upon the trial, and find in it no sufficient reason for reversing the judgment of the Circuit Court.

Appellant excepted to the refusal of the court to give certain instructions asked for by him. There was no evidence on which to base the instructions, and they were properly refused.

The judgment of the Circuit Court is affirmed.

West Chicago Street Railroad Co. v. James H. Whittaker, Adm'r.

1. *NEGLIGENCE—Proof of Exact Age of Deceased Not Necessary in Suit by Administrator Based On.*—In a suit by an administrator to recover damages for injuries to his intestate resulting in death, the declaration alleged that the deceased was eight years old at the time of his death. No proof of the age of the deceased was made on the trial, but some of the witnesses alluded to him as a "little boy" and others as a "child." *Held*, that exact proof of the age of deceased was not essential to a recovery.

2. *NEGLIGENCE—A Question for the Jury.*—This court holds from a consideration of all the evidence, which was conflicting, that the question whether the defendant was negligent, as averred in the declaration, was peculiarly a question for the jury; that the trial court properly overruled the motion for a new trial, and that the verdict must stand.

Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed October 11, 1897.

ALEXANDER SULLIVAN, attorney for appellant; EDWARD J. McARDLE, of counsel.

CASE & HOGAN, attorneys for appellee.

PER CURIAM.

Appellee is administrator of the estate of his deceased son, Roger C. Whittaker, who was killed by a horse car of appellant July 31, 1893. The declaration charges, among other things, negligence on the part of the appellant in not keeping a proper lookout, and in not stopping the car before collision with the deceased. The deceased is alleged in the declaration to have been eight years old at the time of his death, but no proof of his age was made on the trial. Some of the witnesses, however, alluded to him as a "little boy," others as a "child;" one of the appellant's witnesses called him a "boy" another a "child." Appellant's counsel insists that the omission to prove how many years old the deceased was is fatal, both as affecting the question of care on the part of his parents, and as affecting the question of damages. During the trial of the case no specific objection was made in regard to this omission, nor is there anything in the motion for a new trial calling attention to it, but appellant's counsel contends that it was sufficiently presented to the trial court by a motion which he made at the close of the evidence to exclude appellee's evidence from the jury. This proposition would be correct if exact proof of the age of plaintiff's intestate were essential to a recovery, so that without such proof there could be no recovery. But such is not the law.

The evidence clearly tended to prove appellee's case as averred in the declaration, and the exclusion of the evidence by the trial court would have been error.

Appellant, in his argument, does not complain of any error in giving or refusing instructions, but relies solely on the proposition that appellee's evidence did not establish his case as averred in the declaration. Upon consideration of all the evidence, which is conflicting, we are of opinion

that the question whether appellant was negligent, as averred in the declaration, was peculiarly a question for the jury, and that the trial court properly overruled the motion for a new trial.

The judgment is affirmed.

Henry Schafer, Adm'r, v. Grace J. Moe.

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1. JURISDICTION—*Waiver of Objections to.*—Where a cause which has been dismissed is reinstated, a person who appears and takes part in the trial by cross-examining witnesses and by calling witnesses in his own behalf can not be heard to question the jurisdiction of the trial court on appeal. Objections to jurisdiction, whether made by plea or otherwise, must be persisted in, and solely relied on, in order to be available.

2. PRACTICE—*What a Bill of Exceptions Should Show.*—The bill of exceptions in this case contains no instructions and does not show that a motion for a new trial was made, and hence this court can not consider alleged errors relating to instructions.

Replevin.—Appeal from the Superior Court of Cook County; the Hon. JAMES GOGGIN, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed October 11, 1897.

J. W. RICHEY, attorney for appellant.

M. W. ROBINSON, attorney for appellee.

MR. PRESIDING JUSTICE ADAMS DELIVERED THE OPINION OF THE COURT.

This is an action of replevin by appellee against appellant's intestate, Christian Erickson, and James H. Gilbert, formerly sheriff of this county, before a justice of the peace. Appellee recovered judgment before the justice, and the case was appealed to the Superior Court, where appellee, December 22, 1894, in a trial before the court and jury, again recovered judgment, and appellant appealed to this court.

It appears from the record that, February 16, 1893, a transcript from the justice was filed in the cause; that at the March term, 1893, the appellee, by her attorney, filed her appearance, and that July 6, 1893, at the July term of the court, the case was called for trial, and appellee not appearing, the suit was dismissed at her costs for want of prosecution. No motion to set aside or vacate the judgment of dismissal was made until April 18, 1894, at the April term of the court. The court granted the motion, and April 18, 1894, vacated the judgment and reinstated the cause, and appellant excepted.

The appellant assigns as error the setting aside, April 18, 1894, the judgment of July 6, 1893, on the ground that the court had no jurisdiction so to do, and that consequently the court had no jurisdiction, as counsel contends, to try the cause and render judgment. The court had jurisdiction of the subject-matter. Appellee, the plaintiff in the cause, had entered her appearance in March, 1893; the appellants, defendants in the lower court, appeared when the case was called for trial, December 22, 1894, and objected to the trial, but nevertheless participated in it by cross-examining appellee's witnesses and calling and examining witnesses for the defense. In other words, they defended on the merits. This was a waiver of all objection to the jurisdiction of the court. Such objection, whether made by plea or otherwise, must be persisted in and solely relied on, in order to be available.

As said by the court in *Herrington et al. v. McCollum*, 73 Ill. 476, "The court unquestionably had jurisdiction of the subject-matter of litigation, and it has never been questioned that parties may so far control jurisdiction over their own persons, in such a case, as to confer upon the court the right to proceed, by voluntarily entering an appearance. The defendants, to avail of the right to question the jurisdiction of the court when the case was reinstated, should either have not appeared at all, or limited their appearance to the objection against the jurisdiction of the court." See also *Prall v. Hunt et al.*, 41 Ill. App. 140;

Nat. Un. Bldg. Ass'n v. Brewer, Ib. 223; Schmohl v. Fiddick, 34 Ill. App. 190.

Appellant's counsel complains, in his argument, of the giving of an instruction for the appellee, and the refusal of an instruction asked by appellant, and of certain rulings of the court on the evidence.

The bill of exceptions contains no instruction, nor does it show that a motion for a new trial was made; the court, therefore, can not consider appellant's objections. East St. L. Elec. R. R. Co. v. Cauley, 148 Ill. 490.

Judgment affirmed.

Edward Bertalot v. Frank T. Kinnare, Adm'r.

1. *NEGLIGENCE—Extent of Liability of Proprietor of Swimming School for.*—The proprietor of a swimming school or natatorium is liable for an injury to a patron, resulting from lack of ordinary care in providing for his safety and without fault of the patron; but such proprietor is not in any sense an insurer of the safety of his patrons, and the death of a patron within his premises does not cast upon him the burden of excusing himself from any presumption of negligence.

2. *VERDICTS—Not Supported by the Evidence.*—Verdicts, whether general or special, have no value when unsupported by evidence, and in this case the verdict can not stand, because it is not supported by any evidence whatever as to how the deceased happened to meet the disaster which resulted in his death, or as to what negligence, if any, contributed thereto or was the proximate cause thereof.

Trespass on the Case, for personal injuries. Error to the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in this court at the March term, 1897. Reversed and remanded. Opinion filed October 11, 1897.

MERRICK, EVANS & WHITNEY, attorneys for plaintiff in error.

McDANNOLD & PHELPS, attorneys for defendant in error.

MR. JUSTICE SEARS DELIVERED THE OPINION OF THE COURT.

On July 23, 1892, plaintiff in error was the owner of and conducted the business of a swimming school or natatorium.

On the evening of that day Armand J. Bachand, a boy of about fifteen years of age, visited the natatorium to bathe, and paid his admission therefor. He was last seen alive about 9:30 o'clock, in the water at the shallow end of the tank, and some ten or fifteen minutes later was discovered unconscious and perhaps already lifeless, at the bottom of the pool. All efforts to resuscitate him were without avail.

For his death, and alleging negligence on the part of plaintiff in error as the proximate cause thereof, the defendant in error brought this suit, and recovered verdict and judgment therein.

The several counts of the declaration allege as the negligence complained of, first, failure of attendants to watch intestate while bathing; second, lack of railing at the north end of tank; third, permitting the room in which the tank was located to become over-crowded; fourth, failure to provide instructors to watch intestate, whereby failure to rescue resulted.

It is doubtless the law that the proprietor of such an institution would be liable for injury to a patron, if such injury resulted from lack of ordinary care in providing for his safety, and without fault of the patron; but it is as surely not the law that such proprietor is in any sense an insurer of the safety of his patrons, nor would the death of a patron within his premises cast upon the proprietor the burden of excusing himself from any presumption of negligence. *Brotherton v. Manhattan B. I. Co.*, 48 Neb. 567.

It was incumbent upon defendant in error, as plaintiff in the trial court, to sustain his declaration with evidence, and to establish the averments of some one of its counts. The question here presented is simply whether the record shows evidence which would warrant the jury in finding that there was such lack of ordinary care as is alleged, and that it was the proximate cause of the death of the intestate.

Defendant in error presented no evidence to show just how the lad came to his death, except that some ten or fifteen minutes after he was seen alive and in a place of

safety, he was found unconscious, and, it may be, already dead, at the bottom of the swimming tank.

It is true that Carr, a witness for defendant in error, did testify in direct that he saw the lad "treading water," and a few moments later he had disappeared, and was shortly after found at the bottom of the tank. But this testimony, which would have constituted a showing of the manner of the accident, was set at naught by the later statement of the same witness, when he said, "I don't know that the boy I saw treading water was the boy found dead in the pool. I did not see his face."

The proximate cause of the accident, therefore, was not discoverable from the evidence presented by defendant in error. Plaintiff in error on the other hand, did present evidence, viz., the testimony of two witnesses, to the effect that the boy was pushed into the pool *at the south end* by other patrons of the place, and then as he fell into the water, was struck by a diver (also a patron), who plunged down from swinging rings overhead.

The jury by their general verdict and their special findings discredited this testimony and found specifically that the lad did not meet his death in the manner described by these witnesses. But verdicts, whether general or special, have no value when supported by no evidence. And so it is on the record here.

A verdict for plaintiff in error would have been warranted had the jury given credit to the testimony of his witnesses. The verdict for defendant in error was bad, because unsupported by any evidence whatever as to how the intestate happened to meet the disaster which resulted in his death, and what negligence, if any there was, contributed thereto, or was the proximate cause thereof. The verdicts, general and special, could have been based upon nothing but guess-work. Whether the jury guessed that the accident was caused by a slippery floor (not averred but proved), lack of railing (not averred as to the south end), a crowded room, or by simply getting beyond depth in efforts to learn to swim, and negligent omission by attendants to

Dickinson v. Gray.

effect a rescue, is immaterial. Certain it is that from the evidence it can not be found that any one of these things had aught to do with the accident, and it is certain, too, that the evidence warrants no conclusion of any negligence after the boy was found in the water; and if negligence was assumed after the discovery of the body, it could not be determined that such negligence had any bearing upon the lad's death in the absence of any evidence as to how long he had been beneath the water before discovery. Neither does it profit to inquire as to any negligence claimed to have been shown on the part of plaintiff in error or his attendants before the discovery of the body, for it can not be determined from this record whether such negligence, if any there was, caused the result of the boy's death.

In *Brotherton v. Manhattan B. I. Co.*, *supra*, the court say: "How Brotherton got back into the deep water and what occurred there is not revealed by any evidence. It is not sufficient to establish a case for the plaintiff that negligence should be proved on the part of the defendant, but it must also appear that the negligence proved was the proximate cause of the injury." This is a statement of a familiar proposition of law, but it bears particularly upon the case under consideration by reason of similarity of facts.

Because of the insufficiency of the evidence to sustain the declaration, the verdict should have been set aside and a new trial granted.

Judgment reversed and cause remanded.

W. P. Dickinson et al. v. W. H. Gray et al.

1. WITNESSES—*Credibility of, a Question for the Jury.*—The jury are the sole judges of the credibility of the witnesses, and where there are but two witnesses and their testimony is in direct conflict the jury have an undoubted right to find in favor of the statements of one as weighed against those of the other; and the same rule applies to the trial judge when issues of fact are submitted to him.

2. APPELLATE COURT PRACTICE—*When the Sufficiency of the Evidence*

72	55
75	130
72	55
76	487
76	522
78	552
78	555
79	36
72	55
80	308
83	305
72	55
87	598
72	55
94	*247
72	55
97	*867
72	55
109	*168

May be Inquired Into.—In this State an appellate tribunal can not inquire into the sufficiency of the evidence to support a judgment unless there is an exception to the finding and judgment when the case is tried by the court, or a motion for a new trial and exception to the overruling of the same, when a trial is had by jury.

3. *SAME—What Abstract Must Show.*—It is the rule of this court that the abstract must show all facts necessary to be considered and that the court will not go to the record for information.

4. *APPEALS AND ERRORS—Motion for a New Trial Unnecessary when Case is Tried by the Court.*—Where a jury is waived and a case is tried by the court, no motion for a new trial is required, and if an exception to the judgment is shown by the bill of exceptions the judgment may be reviewed on appeal.

Assumpsit, on a written contract as modified by parol. Appeal from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed October 11, 1897.

JAMES L. CLARK, attorney for appellants.

CUTTING, CASTLE & WILLIAMS, attorneys for appellees.

MR. JUSTICE SEARS DELIVERED THE OPINION OF THE COURT

This is an action brought upon a contract in writing, alleged by appellees (plaintiffs in trial court) to have been, changed in some particulars by a later oral agreement.

The controversy of fact was as to whether such modification was made. One of appellees testified that it was; and one of appellants testified that it was not changed. There was no other evidence upon the subject. The contract was performed by appellees upon the terms of the alleged modification, and not in accordance with the requirements of the original writing.

The cause was tried by the court without a jury.

It is contended by counsel for appellants that, there being but two witnesses, one of whom affirmed and the other of whom denied the fact in controversy, there could not, as a proposition of law, be any preponderance of the evidence.

We do not understand this to be the law.

In *Durant v. Rogers*, 87 Ill. 508, the court say:

“It is a rule, that the jury shall be the sole judges of the credibility of witnesses. They see them on the stand, mark their demeanor, perceive many small matters which escape less observant eyes, and are in the best position to judge of their credibility, and they have an undoubted right to find in favor of one when weighed against that of the other.”

If the jury may so do, why not as well the court, when finding upon issues of fact submitted?

But there is another sufficient reason why this appeal can not avail. The abstract shows a judgment for appellees, but it does not show that appellants excepted to the finding of the court, or the judgment.

It is the rule that the court will not go to the record for information. *Gibler v. City of Mattoon*, 167 Ill. 18.

And if we were to disregard the rule and look to the bill of exceptions itself, it would be found that upon the court finding for appellees, appellants entered a motion for a new trial, and excepted to the overruling of the same. In a trial by the court without a jury, this was unnecessary. *Sands v. Kagey*, 150 Ill. 109.

But it will not be found from the bill of exceptions that appellants excepted to the finding and judgment, and this was necessary to entitle them to have the cause reviewed upon appeal. In *Illinois C. R. R. Co. v. O'Keefe*, 154 Ill. 511, the court says:

“In this State the rule is settled that an appellate tribunal can not inquire into the sufficiency of the evidence to support a judgment unless there is an exception to the finding and judgment when tried by the judge without a jury, or a motion for new trial and exception to the overruling of the same, when a trial is had by jury. See *Firemen's Ins. Co. v. Peck*, 126 Ill. 493, and cases cited.” *Force Mfg. Co. v. Horton*, 74 Ill. 311.

The judgment is affirmed.

Samuel Davis v. Rittenhouse & Embree Company.

1. **BILLS OF EXCHANGE—*Parol Acceptance.***—A parol acceptance of a bill of exchange or order, is valid in this State and binding upon the acceptor.

Assumpsit, on an order. Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed October 11, 1897.

COWEN & HOUSEMAN, attorneys for appellant.

FRANCIS T. MURPHY, attorney for appellee.

MR. JUSTICE SEARS DELIVERED THE OPINION OF THE COURT.

This cause was brought by the appellee to recover upon an alleged oral acceptance of a written order. The order was as follows:

“CHICAGO, 11, 14, 1895.

Mr. Sam'l Davis.

Please pay to Rittenhouse & Embree Co. the sum of five hundred twenty-seven and 19-100 dollars (\$527.19) in full for all lumber delivered at your building situated between 29th and 30th, Wabash avenue, and charge the amount to my contract.

Signed:

JAS. R. SCOTT.”

The suit resulted in verdict and judgment for appellee.

The evidence warranted the jury in finding that there was an oral acceptance by appellant, unqualified except as to time of payment.

It is contended by counsel for appellant that there should have been no recovery because the acceptance of the order was not in writing, and therefore was within the application of the statute of frauds.

This contention can not be supported. It is settled by the decisions of this State that there may be a valid acceptance

of a bill of exchange or order, though such acceptance be made orally and not in writing. *Mason v. Dousay*, 35 Ill. 424; *Phelps v. Northup*, 56 Ill. 156; *Sturges v. The Fourth Nat. Bk.*, 75 Ill. 595.

The judgment is affirmed.

72	59
88	421

Robert H. Ehlert v. Security Deposit Company.

1. **APPEALS AND ERRORS—*The Statute as to, Must be Followed.***—The right of appeal is statutory, and the statute must be followed and an appeal prayed for and allowed at the term at which judgment is rendered.

2. **SAME—*Appeals in Forcible Detainer Cases.***—The forcible entry and detainer statute does not affect appeals in forcible detainer cases except to require that the bond be filed within five days from the date of the judgment and does not authorize an appeal after the end of the term at which judgment is rendered although such appeal be prayed for within five days from the date of the judgment.

3. **SAME—*Application of Forcible Detainer Statute.***—The section of the forcible entry and detainer act in regard to appeals can have no application to an order of the Circuit Court dismissing an appeal from a judgment rendered by a justice of the peace in a forcible detainer suit as in such case there is "no verdict of a jury or decision of the court, upon any trial had under said act," as provided in said section.

4. **SAME—*Application of Five Days Clause in Forcible Detainer Statute.***—The five days clause as to appeals in forcible detainer cases only applies to appeals from justices of the peace and cases originally begun in a court of record and not to appeals from a court of record, where the case is tried in such court on appeal from a justice of the peace.

Transcript, from a justice of the peace. Appeal from the Superior Court of Cook County; the Hon. NATHANIEL C. SEARS, Judge, presiding. Heard in this court at the March term, 1897. Appeal dismissed. Opinion filed October 21, 1897.

STIBLEN & KING and RICE & McCLANAHAN, attorneys for appellant.

HOYNE, FOLLANSBEE & O'CONNOR, attorneys for appellee.

MR. JUSTICE WINDES DELIVERED THE OPINION OF THE COURT.
Appellee recovered a judgment in forcible detainer before a justice of the peace, from which appellant appealed to

the Superior Court of Cook County, where the appeal was dismissed December 1, 1896, for a failure of appellant to comply with a rule theretofore entered to file a new bond. The appeal was dismissed at the November, 1896, term, and no appeal was prayed until December 7, 1896, being the December term of the Superior Court. The appeal should have been prayed and allowed at the November term. Rev. Stat. Ill., Chap. 110, Sec. 68.

The right of appeal is statutory, and the statute must be followed. The forcible detainer statute does not aid appellant, or make the case different from that of any other appeal, except that the bond must be filed within five days. He still must pray appeal at the term when judgment is rendered. The forcible detainer act can have no application to this case, because there was "no verdict of a jury or decision of the court, upon any trial had under this act," as provided in that statute—only a dismissal of appellant's appeal—and also, under the ruling of the Appellate Court of the Third District, which we are inclined to think is correct (*Davis v. Hamilton*, 53 App. 96), the five days clause regarding appeals in forcible detainer cases only applies to appeals from the justice of the peace, and where the suit is originally begun in a court of record. Under these views it is unnecessary to consider the other questions argued by counsel, and the appeal is dismissed.

Judge SEARS took no part in this case.

West Chicago Street Railroad Company v. John Luka.

1. STREET RAILROADS—*Duty to Passengers Attempting to Alight.*—When a street car is stopped passengers have a right to assume that they may get off the car in safety, and a street railroad company should take note of the movements of passengers endeavoring to get off, and should exercise the greatest care consistent with the practical operation of its cars, to so control their movements, that after being stopped they are not started up without warning to passengers trying to get off, and such

West Chicago Street R. R. Co. v. Luka.

passengers thereby injured. And this is the rule whether the stop is at an established place for discharging passengers or not.

2. *SAME—Care Required of, for Safety of Passengers.*—A street railroad company is not an insurer of the safety of its passengers, but is only bound as a common carrier to exercise the highest degree of care, skill and diligence for the safety of its passengers that is practicable and consistent with efficient use and operation of its cars.

3. *NEGLIGENCE—A Question of Fact for the Jury.*—An instruction telling a jury that certain acts amount to negligence is erroneous, as negligence is a question of fact for the jury.

4. *EVIDENCE—Things Happening After an Accident, not Evidence of Negligence.*—It is improper to instruct a jury in a personal injury case that they may consider evidence of what happened after an accident on the question of the plaintiff's care and the defendant's negligence.

5. *TRIALS—Attempt to Bribe the Jury as Ground for a New Trial.*—A corrupt attempt to influence the verdict of a jury by other means than evidence and argument in open court, is always ground for a new trial on grounds of public policy, without reference to the merits of the case, or the success of the attempt, and the rule should be applied with almost equal stringency even when the attempts are from officious third persons.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Cook County: the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in this court at the March term, 1897. Reversed and remanded. Opinion filed October 21, 1897.

ALEXANDER SULLIVAN, attorney for appellant; E. J. McARDLE, of counsel.

COWEN & HOUSEMAN, attorneys for appellee.

MR. JUSTICE WINDES DELIVERED THE OPINION OF THE COURT.

Appellee was injured in July, 1894, in alighting from one of appellant's horse cars on Ashland avenue near 14th street, Chicago, and brought suit for damages against appellant, claiming that he was injured by the negligence of appellant's servants, causing a rupture and other injuries to appellee.

A trial was had, which resulted in a verdict for appellee of \$6,000, on which the Circuit Court entered judgment, from which this appeal is prosecuted.

Numerous errors are assigned, but inasmuch as we have,

after full consideration of the evidence in the record, which is conflicting, reached the conclusion that it tends to sustain the allegations of the declaration, and that appellee's case should be submitted to another jury (Chicago West Division Ry. Co. v. Mills, 105 Ill. 68, and cases cited), we refrain from any discussion of the evidence, and only pass on such errors assigned as are below noted, and the refusal of the court to instruct a verdict for appellant.

Appellant claims that the trial court erred in giving the jury appellee's 2d, 3d, 7th and 9th instructions, which are as follows:

"2. The court instructs the jury as a matter of law that it is the duty of a common carrier, like a street railway, to carry its passengers safely, and to afford them reasonable opportunity to alight after coming to a full stop.

3. The court instructs the jury, as a matter of law, that if they find from the evidence that the plaintiff in this action was a passenger on one of the cars of defendant, and had with him rightfully on said car his wife and several of his small children, and that the car had come to a stop for the purpose of enabling passengers to alight, and plaintiff had alighted, then it was the duty of the agents and servants of defendant in charge of said car, to afford plaintiff a reasonable opportunity of taking his small children from the car, and if the jury finds that the car was started without affording such opportunity, and the accident resulted therefrom, such starting of the car was an act of negligence on the part of the defendant.

7. The court instructs the jury as a matter of law that if they find from the evidence that the plaintiff in this action was a passenger on one of the cars of defendant, and had with him rightfully, on said car, his wife and several of his small children, then after the car had come to a stop and the plaintiff had alighted, it was the duty of the agents and servants of defendant in charge of said car, to afford plaintiff a reasonable opportunity of taking his small children from the car, and if the jury find that the car was started without affording such opportunity, such starting

of the said car was an act of negligence on the part of the defendant.

9. The court instructs the jury that if they find from a consideration of the evidence concerning *all that happened at, before and after the time of the accident*, that the plaintiff was exercising reasonable and ordinary care, and that the defendant, by its agents, was guilty of negligence as charged in plaintiff's declaration, and that plaintiff was injured thereby, then the jury should find the issues for the plaintiff."

Appellant urges that the declaration charges a stopping of the car near 15th street, at a point where it ought to stop to receive and let off passengers. The evidence, appellant insists, is, that if a stop were really made, it was in the middle of the block near a switch, "and immediately the car started again."

Appellant says it was not a stop to receive or let off passengers, but to let the car off the switch, "and at the time the start and stop were made, the conductor was up with the driver, and the plaintiff knew that, for he says so."

It may be true, as appellant insists, that the place where the car stopped, was not one at which the defendant was bound to stop its car, it being bound to stop its car only upon request of passengers at street intersections or established places for stopping. Nevertheless, it is the common practice in this city, especially with regard to open summer cars, such as this was, for the appellant to permit passengers to get on and off its cars at other places than street intersections; so that when a car is stopped, whether at a street intersection, or in the middle of a block, passengers have a right to assume that they may then get off the car in safety; and the appellant should exercise the greatest care consistent with the practical operation of its cars, whenever its cars stop, to take note of the movements of passengers endeavoring to get off the car, and to so control the movements of its cars that they are not, even when stopped in the middle of a block, started up, without warning to passengers trying to get off, in such manner that

they are injured. As a common carrier it is bound to exercise the highest degree of diligence for the safety of its passengers, with the modification above stated; and it can not say, because it stopped its car in the middle of a block, that it was not bound to exercise that care in seeing to the efforts of passengers to get off at such place.

The appellant having stopped its car, the appellee was not thereafter bound to notify the appellant that he wished to get off and take his children off the car; but the appellant was bound to exercise the greatest care, modified as above stated, to take notice of what, in that regard, the appellee was doing. *Chicago W. D. Ry. Co. v. Mills*, 105 Ill., 63-68-72.

When an ordinary steam railway running and stopping for the reception and discharge of passengers only at regular stations, stops at a place not designated for the reception or discharge of passengers, it is perhaps not the duty of the carrier to keep watch of the movements of passengers who may see fit to get off at such place; but with respect to street cars in a city, the rule, because of the practice of the people and the permission of the carriers, is different.

We therefore think that the objections urged by appellant to the 2d, 3d and 7th instructions as to the element of stopping or the place of stopping the car, are not well taken, except that by the 7th instruction the court assumes that the car had come to a stop, instead of submitting that point to the jury to find from the evidence. This was error, because it was a disputed point in the case. But the 2d instruction is erroneous in that it makes appellant an insurer of the safety of its passengers, whereas its duty as a common carrier is that it should exercise the highest degree of care, skill and diligence for the safety of its passengers that is practicable and consistent with the efficient use and operation of its cars. *Chicago & A. R. R. Co. v. Arnol*, 144 Ill. 271, and cases cited; *West C. St. R. R. Co. v. Martin*, 47 Ill. App. 615; *North C. St. R. R. Co. v. Wrixon*, 51 Ill. App. 312.

The 3d and 7th instructions are erroneous, however, in that they tell the jury that certain acts are negligence.

Chicago & E. I. R. R. Co. v. O'Connor, 119 Ill. 597; Chicago & I. R. R. Co. v. Lane, 130 Ill. 122, and cases.

The 9th instruction is erroneous, in that it tells the jury in effect that they may consider evidence of what happened after the accident on the question of appellee's care and appellant's negligence. While such an instruction would be proper in reference to damages, it opens too broad a field on the questions of care and negligence.

This instruction was, however, probably harmless, as there seems to have been no evidence offered as to what occurred after the accident bearing on the questions of care and negligence.

The trial in the court below was begun on Friday, January 29th, was continued and resumed on Tuesday, Wednesday, Thursday and Friday of the following week, the jury bringing in its verdict on Saturday morning.

During the adjournment from Friday until Tuesday and on Sunday, some person, unknown to have any connection directly or indirectly with the parties to the suit, or any of the counsel in the case, who gave his name as Murphy, approached one of the jurors, James P. Landers, and after a drink with Landers, said to him, "You are on the jury down town; there is a friend of mine that is paying for his house and lot, and if this case is decided against the railroad company, he will lose his job, and he will lose his house and lot. You would not like to see a laboring man or a poor man lose his house and lot, and if you bring in a verdict for the company, there is \$50 in it for you. I will leave it here with Prendergast and you can get it the minute the case is over."

The money was not left with Prendergast, and Landers communicated the conversation to the court on Monday following. The court instructed Landers to say nothing about it to any one, but put the juror in communication with a detective, and told Landers to try and find out all he could about it; to see Prendergast and try to get him, Prendergast, to get Murphy to give him, Landers, the money, mark the money and give it to the court.

Landers obeyed the instructions of the court as to finding out, but got no further information in the matter. He also communicated what Murphy had said to him to another juror, and possibly to two jurors, during the course of the trial.

After the jury had rendered its verdict, the court announced publicly in the court room that two of the jurors had been corruptly approached. It also appears that another juror, Flynn, evidently one of those referred to by the court, was also approached and offered a bribe by some unknown person to bring in a verdict for defendant, and this was also communicated to the court on Monday while the trial was in progress.

When the attempted bribery was publicly announced by the court after the verdict, was the first knowledge or intimation by any one to either of the parties or counsel in the case of that fact. We think this was a mistaken course on the part of the trial judge. He, no doubt, was conscientious, believing it to be in the interest of justice to keep the attempted bribery secret, possibly thinking he might thereby the better discover the bribe offerer, but we are clear that this was error.

If Landers and Flynn were honest, well-meaning men (and there is nothing in this record to show but that they were), it is but human that their minds would, to some degree, be prejudiced against appellant by what, to them at least, appeared to be an effort to influence their verdict corruptly, either by appellant or in its interest, and while not directly from appellant, it was the same in its practical result. They, no doubt, believed it was inspired by appellant or some of its agents. That being their state of mind, quite naturally the feeling would be stimulated and strengthened by their secret understanding with the court and communication with the detective in efforts to find out the guilty person through a period of four days, while the trial was in progress.

It goes without saying, that if these jurors, on their *wire dire*, had answered that they had theretofore been ap-

proached by an unknown person and offered money to give a verdict for appellant in case they were taken on the jury, that the trial court would not have accepted them against the objection of either party to the suit.

Counsel have given us no assistance on this question by the citation of any authority, and we have not felt it was necessary to support our views by extended reference to precedents, but are satisfied with the reason and correctness of the statement in 2 Thompson on Trials, Sec. 2560, to the effect that a corrupt attempt to influence the verdict of a jury by other means than evidence and arguments in open court, on grounds of a public policy, is always ground for a new trial, without reference to the merits of the case, and whether successful or not, and that the rule will be applied with almost equal stringency even when the attempts are from officious third persons. See also *Heffron v. Gallupe*, 55 Me. 565, and *Nesmith v. Clinton Fire Ins. Co.*, 8 Abb. Pr. Rep. 141.

In the latter case, where the verdict was for the plaintiff, and the tampering with the jury was not by the plaintiff, nor was it shown that he knew of it or promoted it in any manner, a new trial was awarded, and the court says, before a new trial will be denied, it should clearly appear that no injustice has been done, and that the conversations with the juror did not influence the verdict.

The case at bar is a close one, both on the questions of care of the appellee and the negligence of appellant, and no one can say but the verdict was affected by the efforts to bribe the two jurors. The conduct of the jurors in communicating with the court is highly commendable, but the trial should certainly not have continued after that without a knowledge by the parties of the fact and their consent, except, perhaps, with a view of discovering the guilty persons during the progress of the trial, and eventually of awarding a new trial.

For the errors noted, the judgment will be reversed and the cause remanded.

Samuel J. Howe v. Charles S. Babcock.

1. **CREDITOR'S BILLS**—*Character of Return of Execution Necessary to Sustain.*—Where a sheriff has taken all proper steps to collect an execution, has made demand without result, and has been unable to find property to levy upon, he may take the responsibility of returning the execution before the expiration of the ninety days, and the fact that he is requested by the attorney of the creditor to make the return, when such conditions exist, is immaterial. The facts exist which show an exhaustion of the legal remedies, and such facts are not changed, modified or affected by the direction of the creditor's attorney to return the execution unsatisfied, and a creditor's bill will lie.

2. **SAME**—*Execution May be Returned Within Ten Days.*—The statutory provision permitting a creditor to schedule property within ten days after demand does not operate to make a return within the ten days invalid or insufficient to support a creditor's bill.

Creditor's Bill.—Appeal from the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed October 21, 1897.

JESSE HOLDOM, attorney for appellant.

The return of an execution *nulla bona* by order of complainant or his solicitor, does not vest the court with jurisdiction under a creditor's bill. Scheubert v. Honel, 50 Ill. App. 597; affirmed in 152 Ill. 313; Russell v. Chicago Trust & Savings Bank, 139 Ill. 538; Durand & Co. v. Gray et al., 129 Ill. 9.

Not even though the order be entered in a separate record, and not indorsed on the execution. Stirlen v. Jewett, 165 Ill. 410, and cases *supra*.

Where the execution is returned by the sheriff before the expiration of ten days from the demand on the defendant in the execution, whether the return is made by order of plaintiff or his attorney, or on the sheriff's own motion, the defendant in the execution is deprived of a statutory right, viz., the right to deliver to the sheriff a sworn statement of his assets, and thus, by making a full and true schedule, acquaint his creditor with his financial condition, and thereby avoid the annoyance and expense of an inquiry by way of a creditor's bill. Sec. 14, Chap. 52, Starr & Curtis' Stat., 2d Ed.

No appearance for appellee.

MR. JUSTICE SEARS DELIVERED THE OPINION OF THE COURT.

This is an appeal from an interlocutory order appointing a receiver. The suit is a creditor's bill upon a judgment at law. Counsel for appellant contends that the return of the sheriff upon the *feri facias* issued upon the judgment is insufficient to sustain the bill.

It is urged that because the attorney for the plaintiff in the proceeding at law directed a return of the execution during the life of the execution, therefore no such exhausting of legal remedy is shown as is essential to warrant a creditor's bill, and in support thereof counsel cite Scheubert v. Honel et al., 50 Ill. App. 597, affirmed in 152 Ill. 313.

In the case cited the plaintiff's attorney had, constructively at least, directed the sheriff *not* to make a personal demand upon the defendant, *not* to levy upon property, and therefore the execution was returned, without demand or levy, in accordance with such direction.

The case under consideration, however, is, upon the facts presented, distinguishable from Scheubert v. Honel. Here demand is shown to have been made by the sheriff upon the judgment debtors on January 4, 1897, and it was only after such demand had proved unavailing that the attorneys for the judgment creditors directed the sheriff on January 6, 1897, to return the execution.

The question of the sufficiency of a return to justify issuance of a writ of *capias ad satisfaciendum* was involved in Huntington v. Metzger, 158 Ill. 285, and the reasoning of that decision applies equally to the question of the sufficiency of the return here to sustain a creditor's bill.

The court say: "Where — as appears from the return to have been the case here — the sheriff has taken all proper steps to collect the execution and has made demand which has not been complied with, and has been unable to find property to levy on, then he is in a position where he may take the responsibility of returning the execution before the expiration of the ninety days; and the fact that he is requested by the attorney of the creditor to make the return,

when such conditions exist, is no evidence that his act is that of the attorney, and not his own act. The facts exist which show an exhaustion of the legal remedies, and such facts are not changed or modified or affected by the direction of the creditor's attorney to return the execution unsatisfied."

In the case cited the return was made by the officer five days after demand. In the case here two days intervened between demand and return. We do not consider the statutory provision for exemption, permitting the creditor to schedule property within ten days after demand, as operating to make a return within the ten days invalid or insufficient to support a creditor's bill.

Order affirmed.

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Bernard A. Eckhart et al. v. Consolidated Milling Company.

1. **TRADE-MARKS**—*When Use of, Will be Enjoined.*—If the court can see that a complainant's trade-marks are used or imitated in such a manner as probably to deceive customers or patrons, the motives of the defendant in adopting them are immaterial and the piracy should be checked at once by injunction. It need not appear that there was a fraudulent intent of the defendant to dispose of his goods as the goods of another, that the public are in fact misled into purchasing the defendant's goods, believing them to be those of the complainant, or that such a state of facts exist that the court must necessarily infer that the public will be deceived into purchasing the defendant's goods.

Injunction.—Appeal from the Superior Court of Cook County; the Hon. NATHANIEL C. SEARS, Judge, presiding. Heard in this court at the March term, 1897. Order modified and affirmed. Opinion filed October 21, 1897.

KNIGHT & BROWN, attorneys for appellants.

MANTON MAVERICK, attorney for appellee.

MR. PRESIDING JUSTICE ADAMS DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order granting a preliminary injunction on bill and answer.

Eckhart v. Consolidated Milling Co.

The appellee is a manufacturer of and dealer in flour in Minneapolis, in the State of Minnesota, and, since 1891, has manufactured and sold in the Chicago, Illinois, market, in sacks or other receptacles, flour of three different qualities and named, respectively, "Christian's Superlative," "Pettit, Christian & Co. Superlative" and "Ceresota," the sacks or receptacles in which said flour was contained being marked or branded with those names. The appellant, the Eckhart and Swan Milling Co., a corporation, the stock of which is wholly owned by the appellants, Eckhart and Swan, and which is wholly controlled by them, is a manufacturer of and dealer in flour in Chicago, Illinois. The appellants delivered to the purchasers thereof flour manufactured by them in bags with the marks or brands before mentioned thereon. Appellants, not denying the allegation in appellee's bill that appellee had the exclusive legal right to use the marks or brands in question in the disposition and sale of flour, explain their, appellants', use of the bags as follows: They say that their principal customers were bakers, and that sometimes, by agreement with the bakers, appellants made a price on large quantities of appellants' flour in bulk, the bakers to furnish bags for delivery of the flour, and that among the bags furnished by the bakers, in accordance with such agreement, and in which the flour furnished was delivered, were bags marked or branded with the marks or brands of appellee; that appellants also purchased from bakers second-hand jute bags, among which were bags marked with the brand of appellee, and that they used all such bags for the purpose of delivering to such bakers flour sold to them in bulk by appellants, the object of such use of the bags furnished by the bakers and the second-hand jute bags furnished by appellants being, that appellants might be able to sell their flour at a less price than they would if they furnished new bags. Appellants, in their answer, deny that the bakers or the public were deceived, or that appellee was in any way injured by their use of the bags, or that appellants intended by such use to deceive any one.

Counsel for appellants contend that in order to warrant

a preliminary injunction, it must appear that there was a fraudulent intent of defendant to dispose of his goods as the goods of another, or that the public are, in fact, misled into purchasing the defendant's goods, believing them to be those of the complainant, or that such a state of facts is shown that the court must necessarily infer that the public would be so deceived into purchasing the defendant's goods. We can not accede to this proposition.

It is not necessary to entitle the complainant to relief to show that the defendant acted with a fraudulent intention.

In Pratt's Appeal, 117 Penn. St. 401, the master found in his report that the defendant did not intend to perpetrate an actual fraud in adopting the plaintiff's mark, and the lower court says in an opinion, "I have carefully examined the testimony upon this point, and can discover no evidence of fraud or bad faith in the use of the trade mark," and a perpetual injunction was granted. On appeal, the court say: "If the defendant's print is an imitation of that of the plaintiff, if it is calculated to deceive and mislead, the motive of defendant in adopting it is not material so far as the law of the case is concerned, however much it might affect it in a moral point of view. The protection which equity extends in such cases is for the benefit of the manufacturer, and to secure to him the fruits of his reputation, skill and industry. The protection of the public is another consideration and one that does not usually enter into such cases," etc.

To the same effect are the following cases: Holmes et al. v. Holmes, etc. Mfg. Co., 37 Conn. 278; Filley v. Fassett et al., 44 Mo. 168.

In the last case the court say: "Nor is it necessary to show that any one has, in fact, been deceived, or that the party complained of made the goods. (2 Sandf. S. C. 607; 25 Barb. 79; 23 Eng. L. & E. 53-4; 2 Sandf. Ch. 597.) Nor is it necessary to prove intentional fraud. 'If the court sees that complainant's trade-marks are simulated in such a manner as *probably* to deceive customers or patrons of his trade or business, the piracy should be checked at once by injunc-

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tion.’” 4 McLean, 519; 2 Barb. Ch. 103; Blackwell v. Wright, 73 N. C. 310; Davis v. Kendall, 2 R. I. 566; Millington v. Fox, 3 Myl. & Cr. (14 Eng. Ch. R.) 338.

In the last case the court says: “I have no reason to believe that there has, in this case, been a fraudulent use of the plaintiffs’ marks. It is positively denied by the answer, and there is no evidence to show that the defendants were even aware of the existence of the plaintiffs as a company manufacturing steel; for although there is no evidence to show that the terms ‘Crowley’ and ‘Crowley Millington’ were merely technical terms, yet there is sufficient evidence to show that they were very generally used, in conversation at least, as descriptive of particular qualities of steel. In short, it does not appear to me that there was any fraudulent intention in the use of the marks. That circumstance however, does not deprive the plaintiffs of their right to the exclusive use of those names, and therefore I stated that the case is so made out as to entitle the plaintiffs to have the injunction made perpetual.”

In Coffeen v. Bruton, 5 McLean, 256, the court says: “To entitle a complainant to protection against a false representation, it is not essential the article should be inferior in quality, or that the individual should fraudulently represent it, so as to impose upon the public; but if, by representation, it be so assimilated as to be taken in the market for an established manufacture or compound of another, the injured person is entitled to an injunction.” Ib. 260; see, also, Browne on Trade Marks, 2d Ed., 386; Am. & Eng. Ency. of Law, Vol. 26, p. 444, and cases cited.

There is no question of imitation in the present case, because the marks or brands on the bags used by appellants for the delivery to their customers of flour manufactured by them, were the very marks or brands of appellee, and were placed on the bags by appellee.

To entitle a complainant to relief by injunction in a case like the present, it is not necessary to show that the public are or have been actually deceived. The remedy by injunction is preventive, and it is sufficient to show facts from

which the court can deduce the conclusion that the complainant has reasonable ground to fear that the public and the complainant's customers may be deceived, to the injury of the complainant; that the use made by the defendant of the complainant's marks is calculated to deceive, and probably will deceive, the public, to the injury of the complainant. It is obvious that after appellants delivered flour to their customers, the bakers, in bags marked and branded as before stated, appellants could not, in all cases, follow the bags, nor could they control the bakers in the disposition of their flour, nor could they have personal knowledge as to how the bakers disposed of it, or as to whether or not they sold it, or any of it, or exposed it for sale in the bags in which it was delivered to them; or represented to their, the bakers', customers, that bread sold by them was made of flour of the brands marked on the bags, showing the bags. By delivering to the bakers their flour in bags marked as stated, they put it in the power of the bakers to dispose of the flour as that of appellee. See *Coats v. Holbrook*, 2 Sandf. Ch. 587.

The appellants, in their answer, aver that bakers were their principal customers, indicating that they had other customers, but nowhere in their answer do they aver that the bakers were the only customers to whom they delivered flour in bags marked with appellee's marks or brands. Appellants also say in their answer that the only pecuniary advantage to them of using bags with appellee's trademarks or brands on them, is that they can sell their flour at a lower price than they could if they should furnish new bags, and it is obvious that this is the only pecuniary benefit which could legitimately accrue to them from the use of the bags. But they can have the same benefit or advantage if, before using the bags, they simply obliterate the trademarks of the appellee.

It is urged by counsel for appellants that the injunction order is too broad, in that it enjoins the appellants not only from using the second-hand bags of the appellee bearing the marks or brands of the appellee, but from at all using

the second-hand bags of appellee. The part of the order in respect to which the objection is made is as follows: "The defendants and each of them are hereby enjoined and restrained from using the second-hand bags of the complainant, or the second-hand bags bearing the marks or brands of the complainant, in which to sell or deliver any flour other than that manufactured by complainant," etc.

Grammatically construed, the order is too broad, and had appellants' counsel applied to the lower court for a modification of the order, we have no doubt that the court would have modified it. Appellants had the right to use bags which appellee had disposed of in the market, for the delivery of flour manufactured by appellants, or for any other lawful purpose, after obliterating appellee's marks or brands thereon.

The injunction order should read: "The defendants and each of them be and they are hereby enjoined and restrained from using the second-hand bags bearing the mark or brands of the complainant," and that part of the order enjoining appellants from using "the second-hand bags of the complainant" should be omitted; and the court is directed to modify the order accordingly.

The order, with the exception stated, is affirmed, neither party to recover costs.

Judge SEARS, having heard the cause below, took no part in the decision here.

Willis P. Dickinson v. John P. Bull.

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105 *238

1. *SHORT CAUSE CALENDAR—Time Allowed for Call of.*—The statute requires that "at least one day in each week" shall be set apart to try causes upon the short cause calendar, but such provision does not operate to the exclusion of all days but one where the size of the calendar demands more.

2. *COURTS—Presumption as to Compliance with Rules.*—In the absence of a showing to the contrary, the presumption is that the court complied with its rules with reference to the calling of its short cause calendar.

8. **PRO MISSORY NOTES—Legal Holder May Recover on.**—In a suit on a promissory note, proof that the plaintiff has no beneficial interest in the note, is not a bar to the suit; it is enough that the plaintiff is the legal holder of the note.

Assumpsit, on a guarantee of a promissory note. Appeal from the Superior Court of Cook County; the Hon. NATHANIEL C. SEARS, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed October 21, 1897.

JAMES L. CLARK, attorney for appellant.

CRATTY BROS., JARVIS & CLEVELAND, attorneys for appellee.

PER CURIAM.

Appellant was sued upon his guaranty of a promissory note for \$500, made by one Alfred C. Clark to the order of himself and by him indorsed, and this appeal is from the judgment for \$514.70 recovered in the action, upon the verdict of a jury.

When the case was called for trial, the attorney for appellant filed his own affidavit, setting forth reasons for a continuance of the cause, including what two specified absent witnesses would swear to, and to avoid the effect of a continuance the appellee admitted in open court that the absent witnesses relied upon would testify as stated in the affidavit, but reserved the right to object to the competency and sufficiency of their testimony; and thereupon the cause proceeded and said affidavit was read in evidence in behalf of appellant.

The jury, without instructions, returned a verdict for the amount due upon the note.

The assignments of error that are argued raise only technicalities. The first one is that a cause may not be upon a short cause calendar more than one day in a week, and that the custom of the courts in Cook county is to call such calendars only on Mondays, whereas this cause being upon the calendar for Monday, but not reached, was called and tried on the following Friday.

Richardson v. Anglo-American Provision Co.

The statute requires that "at least one day in each week" shall be set apart to try causes upon the short cause calendar, but such provision does not operate to the exclusion of all days but one in a week, where the size of the calendar demands more. *Armstrong v. Crilly*, 51 Ill. App. 504.

If there be a custom of the courts in Cook county such as appellant asserts, it is not shown by this record, and we need say no more about it. In the absence of all showing to the contrary, the presumption is that the court complied with its rules with reference to the calling of its short cause calendar.

It is argued that because it was proved the appellee had no beneficial interest in the note, a new trial should have been granted by the court below.

It is enough that the plaintiff in a suit upon a promissory note be the legal holder thereof. If he be not the beneficial owner, all defenses that would be available against the beneficial owner for whom he holds, would be good against him. This disposes of the only hint the record contains of any merit in appellant's defense to the note.

The judgment ought to be affirmed, and it is so ordered. Judgment affirmed.

Judge SEARS took no part in the decision of this case.

Edwin A. Richardson v. Anglo-American Provision Co.

1. MASTER AND SERVANT—*Limitations on Duty of Master to Provide for Safety of Employees.*—A building while in course of construction undergoes constant changes and passes through successive temporary conditions, many of which must from the very necessity of construction be dangerous, and the obligation of a master to furnish reasonably safe places and structures for his servants to work upon, does not impose upon him the duty of keeping a building which they are employed in erecting in a safe condition at every moment of their work. The hazard of working upon such a building should be held to be an ordinary hazard, incident to the employment, and hence assumed by the employe.

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88	477
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193	1286
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101	404
101	405
101	498
72	77
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Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Cook County; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed October 11, 1897.

HOLLETT & TINSMAN, attorneys for appellant.

WALKER & EDDY, attorneys for appellee.

MR. JUSTICE SEARS DELIVERED THE OPINION OF THE COURT.

On the 14th day of March, A. D. 1891, the Anglo-American Provision Company, appellee, was engaged in altering a building at the Union Stock Yards, Chicago, which was owned and used by it as a packing-house. Edwin A. Richardson, appellant, was working on this building as a carpenter in the employ of appellee, under direction of the foreman who had charge of the construction and alteration of the building.

The building was a large, five-story structure, and the alterations consisted in raising the ceiling of each story and adding an additional story at the top. Appellant, with other carpenters, was engaged in constructing an addition upon the top, which ran from the east end or front of the building to the west end, midway between the sides. This was called the "lookout."

The evidence presented by appellant would show that on the morning in question appellant with others was directed by the foreman to finish the south side of this "lookout." That the boards forming the roof of the main building were all laid and in place. That they were all properly nailed to the roof joists with the exception of three or four boards adjoining the southeast corner of the space where the lookout was to be erected. That these three or four boards were laid in place up against each other in the same manner as the balance of the roof, but that the men who laid them had failed to nail them down. The appellant had had nothing to do with the laying of the roof boards, which was done by other carpenters under the same foreman. That appellant heard them nailing down the roof

boards the day before the accident while he was working upon the lookout. That the foreman gave appellant no notice that the roof boards near the corner of the space where the lookout was to be erected were not nailed, and appellant did not know of this condition; nor is there any evidence that the foreman or appellee knew of it; that appellant walked to where the studs were lying and picked one up, and proceeded with it along and upon the main roof towards the southeast corner of the open space for the lookout; that as he came up to the corner he stooped down with the piece of studding in his hand for the purpose of marking the stud, and preparing it to form the corner stud of the lookout; that as he was in the act of stooping down the board tilted up, because it was not nailed, and he fell over the front of the building, a distance of about fifty feet, struck upon the roof of a shed, and sustained injuries. To recover damages for such injuries this suit was brought.

Upon the conclusion of the evidence for appellant the trial court directed a verdict for appellee.

The only question here presented is whether the evidence warranted submission to a jury and a verdict for appellant, if one were found. The jury could have found from the evidence that the roof boards in question were left unnailed, and that said condition was the cause of the accident. Whether appellant was in the exercise of ordinary care was a question for the jury. So that the consideration is narrowed to one question, viz.: Was the condition of the roof boards in violation of any duty which the law imposed upon appellee? We think not.

The doctrine contended for by counsel for appellant is settled beyond possible question as applied to machinery, structures or places *provided* by the employer for the use of his employe. But the rule can not, we think, be reasonably extended to cover portions of an incomplete building in process of construction. That it does apply to scaffolding, furnished by the employer for brief use only, is true; and the rule is often announced as covering "surroundings," viz.: the master is obligated to provide reasonably safe

surroundings; but it does not seem logical or just to give to the term an interpretation broad enough to cover portions of the building itself while in course of construction, and while undergoing constant changes and passing through successive temporary conditions, many of which must, from the very necessity of construction, be dangerous. The hazard involved in working upon a building during such changes of condition should, it would seem, be held to be an ordinary hazard, incident to the employment and hence assumed by the employe.

The decision in *Armour v. Hahn*, 111 U. S. 313, reaches this conclusion of non-liability, although partly by different reasoning, viz., the application of the rule as to negligence of fellow-servants. The court say :

“There was no evidence tending to prove any negligence on the part of the firm of which the defendant was a member, or of their superintendent or of the foreman of the gang of carpenters. The obligation of a master to provide reasonably safe places and structures for his servants to work upon does not impose upon him the duty, as toward them, of keeping a building which they are employed in erecting in a safe condition at every moment of their work, so far as its safety depends upon the due performance of that work by them and their fellows. The plaintiff was not a minor, employed in work which was strange to him, but was a man of full age, engaged in ordinary work of his trade as a carpenter. The evidence tended to show that he and one of his comrades were directed by their foreman to push the joist out on the projecting sticks of timber, not that he told them to go out themselves. The projecting timber upon which the plaintiff placed his foot was inserted in a wall which was in the course of being built, and which at the time had been bricked up only so far as to be on a level with the upper surface of the timber. The usual course, as the plaintiff himself testified, was to put the timber in, and leave it in that way temporarily, and afterward build the wall up over it. It is not pretended that the stick of timber was in itself unsound or unsuitable for

its purpose. If it was at the time insecure, it was either by reason of the risks ordinarily incident to the state of things in the unfinished condition of the building, or else by reason of some negligence of one of the carpenters or bricklayers, all of whom were employed and paid by the same master, and were working in the course of their employment at the same place and time, with an immediate common object, the erection of the building, and, therefore, within the strictest limits of the rule of law upon the subject, fellow-servants, one of whom can not maintain an action for injuries caused by the negligence of another against their common master."

That the employer can not, in reason, be bound to warn employes of such transitory risks, is held in *McCann v. Kennedy*, 167 Mass. 23; see also Vol. II, *Bailey's Personal Inj. relating to Master and Servant*, 3024-5, p. 1021.

That a like rule applies when a building is in process of tearing down, see *Clark v. Liston*, 54 Ill. App. 578.

The trial court therefore did not err in directing a verdict for appellee.

Judgment affirmed.

Mr. Justice WINDES takes no part in the decision of this case.

Chicago City Railway Company v. Margaret Canevin.

1. NEGLIGENCE—*Care Required of Plaintiff Suing for Injuries Caused by.*—In order to entitle a plaintiff to recover for injuries alleged to have been occasioned by the negligence of the defendant, it must appear that the plaintiff himself was in the exercise of ordinary care for his own safety, and any want of ordinary care on his part which contributed to the injury must prevent a recovery.

2. SAME—*Care Required of Plaintiff Suing for Injuries Caused by.*—The rule is well settled, by numerous adjudications, that there can be no recovery for injuries caused by the negligence of a defendant, if the plaintiff's negligence contributed in any degree to the injury, and an instruction allowing a recovery, unless the plaintiff was guilty of a want

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73	188
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77	58
77	216
78	479
78	593
79	213
79	295
72	81
80	74
80	150
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80	575
82	239
82	376
83	403
83	508
72	81
85	604
72	81
88	243
183	300
72	81
91	310
72	81
92	819

72	81
f93	* 67
f93	*100

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f94	*404

of ordinary care which materially contributed to the injury, is erroneous.

72	81
97	*522
98	*544

8. INSTRUCTIONS—*Should be Accurate in Close Cases.*—In a case where the evidence is conflicting, and there may be doubt, each party has an indubitable right to have the jury clearly and accurately instructed as to the law of the case, and to insist not only that his own instructions shall be proper, but that those of the opposite party shall be free from error.

72	81
106	*138
106	*138
108	* 62
108	* 67

4. SAME—*Should Apply to the Evidence.*—When there is no evidence to which a proposed instruction is applicable, it should be refused.

72	81
106	*138
106	*138
108	* 62
108	* 67

5. MEASURE OF DAMAGES—*Mental Pain in Personal Injury Cases.*—Mental pain may be the direct result or concomitant of physical pain, and in such a case it is a proper element of damage in a personal injury suit, but mental pain not directly or necessarily connected with the physical pain, is not proper to be considered by the jury in assessing damages.

72	81
106	*138
106	*138
108	* 62
108	* 67

6. EVIDENCE—*Right of Cross-examination as to Cause of Injuries Complained of.*—Where the plaintiff, in a personal injury case, attributes certain ailments to the injuries received at the time of the accident, the defendant has the right to cross-examine him as to matters occurring before the accident, which might have caused, or contributed to cause, the suffering complained of.

72	81
111	*582

7. WITNESSES—*Waiver of Right to Refuse to Answer.*—When a person is both party and witness for himself, he must be held, on cross-examination, to have waived any privilege he might otherwise possess to refuse to answer questions as to any matter about which he has given testimony in chief.

8. SAME—*Right of Witness to Refuse to Answer is Personal.*—The privilege of a witness to refuse to answer when his answer might criminate him is his own and not that of the parties, and counsel therefore should not be allowed to make the objection.

Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. ARTHUR H. CHETLAIN, Judge, presiding. Heard in this court at the March term, 1897. Reversed and remanded. Opinion filed October 11, 1897.

W. J. HYNES and H. H. MARTIN, attorneys for appellant.

CASE & HOGAN, attorneys for appellee; A. W. BROWNE, of counsel.

MR. PRESIDING JUSTICE ADAMS DELIVERED THE OPINION OF THE COURT.

The appellee sued the appellant in case for alleged negligence. It is averred in the declaration that about October

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8, 1893, the appellee, at a point on Sixty-third street, east of Carpenter street, in Chicago, became a passenger on an electric car operated by appellant, and was carried in said car to the corner of Sixty-third and Carpenter streets, where the car was stopped by the conductor, on a signal given by appellee, for the purpose of permitting her to alight; that the car was not stopped a sufficient or reasonable time to permit her safely to alight therefrom, and that while she was with all due care attempting to alight, the car was suddenly and violently moved, by reason of which she was thrown with great force and violence upon the ground, and was seriously injured, etc.

The evidence on the question whether the accident occurred by reason of the negligence of the appellant was very conflicting; so much so that had the verdict been not guilty it could not be set aside because contrary to the weight of evidence. In such case the instructions should be accurate. *Illinois C. R. R. Co. v. Maffit*, 67 Ill. 431; *Volk et al. v. Roche*, 70 Ib. 297; *Illinois C. R. R. v. Hammer*, 72 Ib. 347; *Toledo, W. & W. Ry. Co. v. Moore*, 77 Ib. 217; *Shaw v. People*, 81 Ib. 150; *Cushman v. Cogswell*, 86 Ib. 62; *Wabash Ry. Co. v. Henks*, 91 Ib. 407; *Chicago B. & Q. R. Co. v. Dougherty*, 110 Ib. 521.

This rule has been frequently announced by this court. *City of Mendota v. Fay*, 1 Ill. App. 418; *Chicago, R. I. & Pac. Ry. Co. v. Harmon*, 12 Ib. 54; *Leyenberger v. Paul*, Ib. 635; *St. Louis Coal R. R. Co. v. Moore*, 14 Ib. 510; *Harvey v. Miles*, 16 Ib. 533; *Peoria, D. & E. Ry. Co. v. Wagner*, 18 Ib. 598.

Appellant asked the court to give the following instruction:

"The jury are instructed that if they find from the evidence that the plaintiff was injured while alighting from the car while it was in motion, and that such conduct on her part was a want of ordinary care for her own safety which contributed to the injury complained of, then she can not recover in this case, and your verdict should be for the defendant."

The court refused to give the instruction as asked, but modified it and gave it to the jury modified as follows:

"19. The jury are instructed that if they find from the evidence that the plaintiff was injured while alighting from the car while it was in motion, and that such conduct on her part, under all the circumstances shown by the evidence, was a want of ordinary care for her own safety which materially contributed to the injury complained of, then she can not recover in this case, and your verdict should be for the defendant."

This instruction authorized the jury to find for the appellee, even though they believed from the evidence that her want of ordinary care, or negligence, contributed to the injury, provided they did not believe from the evidence that such want of ordinary care or negligence materially contributed to the injury. The legal proposition involved in the instruction, stated abstractly, is that in an action on the case for negligence, *per quod* the plaintiff was injured, the plaintiff may recover, notwithstanding his own negligence contributed to the injury, provided his negligence did not materially so contribute. This instruction would have been erroneous even when the now exploded doctrine of comparative negligence prevailed in this State.

The rule is well settled, by numerous adjudications, that there can be no recovery if the plaintiff's negligence contributed in any degree to the injury. This was the rule in this State prior to the decision in *Galena & C. U. R. R. Co. v. Jacobs*, 20 Ill. 478, the doctrine of which case has been repudiated by the Supreme Court, and it is the rule now, as will appear by reference to the decisions prior to and since the decision of the *Jacobs* case. *Aurora Branch R. R. Co. v. Grimes*, 13 Ill. 585; *Chicago & M. R. R. Co. v. Patchin*, 16 Ib. 198. In the last case the court, *Ib.* 202, say:

"While the courts will, as to passengers and freight, apply the enforcement of the strictest diligence, skill and care, and, for want of them, measure the liability for slight negligence, yet the injured party must be free from such negligence as contributes to the injury complained of. *Galena*

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& C. U. R. R. Co. v. Yarwood, 15 Ill. 468; Same v. Loomis, 13 Ill. 548; Aurora Branch R. R. Co. v. Grimes, 13 Ill. 586; Knight v. Abert, 6 Pa. St. 472; N. Y. & Erie R. Co. v. Skinner, 19 Ib. 301; T. R. Co. v. Munger, 5 Denio, 264, 4 Comst. 357; Clark v. Syracuse & Utica R. Co., 11 Barb. 114; Talmadge v. R. & S. R. Co., 13 Barb. 496; Marsh v. N. Y. & Erie R. Co., 14 Barb. 365.

These decisions concur in this, as a general rule, and are sustained by more than fifty decisions referred to in them, made under a variety of circumstances."

After the doctrine of comparative negligence, which had its origin in this State in the Jacobs case, was abandoned, the rule as announced in Chicago & M. R. R. Co. v. Patchin, *supra*, was revived. In Lake S. & M. S. Ry. Co. v. Heslons, 150 Ill. 546, the court say:

"We have repeatedly held, in effect, in the later decisions, beginning with Calumet Iron and Steel Co. v. Martin, 115 Ill. 358, that the doctrine of comparative negligence, as announced in the earlier cases, is no longer the law of this State, and it is to be no longer regarded as a correct rule of law applicable in cases of this character. Pullman Palace Car Co. v. Laack, 143 Ill. 242; Mansfield v. Moore, 124 Id. 133. The doctrine announced in the latter decisions, as applied to this class of cases, requires, as a condition to recovery by the plaintiff, that the person injured be found to be in the exercise of ordinary care for his own safety, and that the injury resulted from the negligence of the defendant."

In North Chicago S. R. R. Co. v. Eldridge, 151 Ill. 542, 549, the court say:

"The rule to which the court is now committed by repeated decisions is, that the plaintiff, before he can recover, on the mere ground of negligence, must show that the injury of which he complains was caused by the negligence of the defendant, and that he, himself, at the time, was in the exercise of ordinary care. When the party injured, at the time of the injury, is in the exercise of ordinary care, no contributory negligence is legally attributable to him,

although he may not have been in the exercise of the highest degree of care." See also *Illinois C. R. R. Co. v. Ashline*, 56 Ill. App. 475, and *Kinnare v. Chicago R. I. & P. Ry. Co.*, 57 Ib. 153.

The rule, that in order to entitle a plaintiff to recover for injury alleged to have been occasioned by the negligence of the defendant it must appear that the plaintiff himself was in the exercise of ordinary care for his own safety, has been settled in this State by numerous decisions, very many of which are cited in *Calumet Iron and Steel Co. v. Martin*, 115 Ill. 358, 368. It seems too clear to require argument, that if a plaintiff must have exercised ordinary care in order to recover, it necessarily follows that any want of ordinary care which contributed to the injury must prevent a recovery; and such is the rule as announced by text writers and the courts. *Beach on Contributory Negligence*, Sec. 11; 2 *Thompson on Trials*, Sec. 1679; 2 *Thompson on Negligence*, pp. 1151, 1152; 1 *Shearman & Redf. on Neg.*, 5th Ed., Sec. 93; 1 *Beven on Neg.*, p. 175, n. 4.

It has been expressly held erroneous to instruct the jury that the plaintiff would be entitled to recover if his own carelessness did not materially contribute to the injury. *Artz v. C. R. I. & P. R. Co.*, 38 Ia. 294; *Monongahela City v. Fischer*, 111 Pa. St. 9; *Mattimore v. Erie City*, 144 Ib. 14.

In *N. J. Express Co. v. Nichols*, 33 N. J. L. 439, the court say:

"The injury must be attributable to the defendant's negligence, and to that alone; if occasioned in any degree by the plaintiff's own negligence, he is without redress," citing numerous cases.

In *Norris v. Lichfield*, 35 N. H. 271, which was a case for negligence in not keeping a highway in repair, the court, p. 276, say:

"In actions of this kind, it is well settled that if the damage sustained has been in any degree directly caused by his own fault or negligence, the plaintiff can not recover against the town," citing a large number of cases.

In *Wilds v. Hudson River R. Co.*, 24 N. Y. 430, the defendant asked the court to charge that "if the negligence of the deceased contributed in any manner to cause the collision which resulted in his death, the plaintiff can not recover," which the court refused to do. Held, that the charge requested stated the law in precise words, and that the refusal was error. *Ib.* 442.

In *Blanchard v. Lake S. & M. S. Ry. Co.*, 126 Ill. 416, the court quotes with approval Wharton on Negligence, as follows:

"The burden is always upon the plaintiff to establish either that he, himself, was in the exercise of due care, or that the injury is in no degree attributable to any want of proper care on his part."

Counsel for appellee contend that if the instruction is faulty, it is cured by other instructions, and refers to appellant's instructions numbered 2, 4, 6, 9, 10, 12 and 13. We are of opinion that neither did these instructions, nor any of them, nor did any instruction given, cure the material error in the modified instruction. As before stated, in a case where the evidence is so conflicting on vital questions as it is in the present case, the instructions must be accurate.

In *Illinois C. R. R. Co. v. Maffit*, *supra*, which was case for negligence, the court, commenting on an erroneous instruction, say:

"Nor is it an answer to say that the instructions on the part of appellant were more accurate. In a case where the evidence is conflicting, and there may be doubt, each party has an indubitable right to have the jury clearly and accurately instructed as to the law of the case; not only that his own instructions shall be proper, but those of the opposite party free from error. In this case there was a conflict of evidence on the question of negligence, and we are unable to say that the verdict was not produced by reason of the giving of these erroneous instructions."

To the same effect are *Chicago & A. R. R. Co. v. Murray*,

62 Ill. 326, 331; Wabash Ry. Co. v. Henks, 91 Ib. 406; Chicago & A. R. R. Co. v. Smith, 10 Ill. App. 359; Lake S. & M. S. R. R. Co. v. Elson, 15 App. 80.

The instruction asked by defendant stated the law correctly, and the modification of the instruction and giving it as modified was error.

The giving of appellee's fifteenth instruction is assigned as error. The instruction is as follows:

"The court instructs the jury that in determining the amount of damages which the plaintiff is entitled to recover in this case, if the jury find from the evidence, under the instructions of the court, she is entitled to recover any damages, the jury have a right to, and should take into consideration all the facts and circumstances in evidence before them, and they may consider the nature and extent of the plaintiff's injuries, if any, testified about by the witnesses in this case; her bodily and mental pain and suffering, if any, resulting from such injuries; the permanent disability, if any, caused by said injuries; the money necessarily paid, if any, by the plaintiff in and about endeavoring to be healed or cured of said injuries; and any future bodily and mental pain or suffering (or future inability to labor or transact business), if any, that the jury may believe from the evidence the plaintiff will sustain by reason of injuries received."

In C. & G. T. Ry. Co. v. Spurney, 69 Ill. App. 549, an instruction was given for the plaintiff in the trial court identical with the above instruction, except that in that case the masculine gender was used in reference to the plaintiff, and in this the feminine. The court, commenting on the instruction, say: "Future mental pain, that is, mere humiliation and grief resulting from contemplation of a maimed and disfigured body, is not an element entering into an ascertainment of the pecuniary damage one has sustained as the result of negligence." Citing Illinois C. R. R. Co. v. Cole, 165 Ill. 334, 339; Peoria Bridge Ass'n v. Loomis, 20 Ib. 236, and Chicago, B. & Q. R. R. Co. v. Hines, 45 Ill. App. 299. In

Illinois C. R. R. Co. v. Cole, *supra*, the court expressly held that future mental anguish which might be suffered by the plaintiff, from contemplation of what might occur, is not an element of damage in an action for a personal injury resulting from negligence. In that case, while the court held that the instructions were substantially correct, yet it also held that certain improper remarks of the plaintiff's counsel might mislead the jury into believing that mental anguish, resulting from contemplation of the injury, was a proper element of damage, and apparently the court was only prevented from reversing the judgment on that ground by the fact that the opposing counsel did not except to the remarks of counsel for the plaintiff at the time they were made.

Bovee v. Danville, 53 Vt. 183, was case for injuries occasioned by a defective highway, the evidence tending to show that the injury caused the plaintiff to have a miscarriage. The court charged the jury, "if this miscarriage was brought about by this injury, any suffering occasioned thereby, any injury to her feelings, or pain that was personal to her, should be compensated." Of this charge, the Supreme Court say: "Any physical or mental suffering attending the miscarriage, is a part of it, and a proper subject of compensation. But the rule goes no further. Any injured feelings following the miscarriage, not part of the pain actually attending it, are too remote to be considered an element of damage."

In C., R. I. & P. Ry. Co. v. Caulfield, 63 Fed. Rep. 396, in error to the U. S. Circuit Court of Appeals, eighth circuit, the trial court instructed the jury, in assessing the plaintiff's damages "to take into consideration his mental suffering because of his crippled condition, and to take into consideration his physical suffering endured by him while his wounds were healing." Of this the Court of Appeals say: "The allusion thus made to mental suffering induced by the plaintiff's crippled condition, as distinguished from physical suffering, appears to have been to those feelings of mortification which the plaintiff might experience in after life, be-

cause he was not sound in body and limb. If such was the idea intended to be conveyed, then we think the court erred in allowing the jury to assess damages of that nature," citing *Bovee v. Danville*, *supra*. The judgment of the lower court appears to have been reversed on other grounds. Other authorities might be cited to the same effect. In the case of *C. & G. T. Ry. Co. v. Spurney*, *supra*, the court, in its opinion, does not purport to reverse the judgment of the lower court because of the instruction in question, but merely makes the comment above quoted. The judgment was reversed because the trial court refused to give an instruction asked by the defendant to the effect that, in determining the weight to be given to the plaintiff's evidence, the jury might consider his interest in the suit. The language of the instruction in question, omitting words unnecessary for the consideration of appellant's objection, is: "Any future mental pain or suffering that the jury may believe from the evidence the plaintiff will sustain by reason of injuries received." Now mental pain may be the direct result or concomitant of physical pain. As the court say in *City of Chicago v. McLean*, 133 Ill. 148, "The body and mind are so intimately connected, that the mind is very often directly and necessarily affected by physical injury. There can not be severe physical pain without a certain amount of mental suffering." Such mental pain as is there described, is a proper element of damage, but mental pain not directly nor necessarily connected with the physical pain, is not a proper element to be considered by the jury in assessing damages.

Appellant's counsel also object that by the instruction the jury are told that, in assessing damages, they may consider "the money necessarily paid, if any, by the plaintiff, in and about endeavoring to be cured of said injuries." There was no evidence that the plaintiff expended any money in trying to be cured. The averment in the declaration is that the plaintiff was obliged to and did lay out large sums of money "in and about procuring the necessary nursing and in and about procuring proper medical attendance for the curing of

Chicago City Ry. Co. v. Canevin.

her said injuries." There being no evidence that there was any money expended by appellee, as alleged in her declaration, it was error to instruct the jury to consider money so expended. *Illinois C. R. R. Co. v. Frelka*, 9 Ill. App. 605, 613; *City of Joliet v. Henry*, 14 Ib. 154, 158; *Reed v. C., R. I. & P. R. Co.*, 57 Ia. 23; *Nichols v. D. & D. Ry. Co.*, 68 Ib. 733; *Eckerd v. C. & N. W. Ry. Co.*, 70 Ia. 353; *Duke v. Mo. P. Ry. Co.*, 99 Mo. 347.

In *Reinback v. Crabtree et al.*, 77 Ill. 182, the court held that when there is no evidence to which an instruction is applicable, it should be refused.

Appellee's counsel suggests that the error was cured by appellant's fifteenth instruction, which informed the jury that they could not allow the plaintiff for any medical attendance or expense; but this position is untenable because, as said by the court in *Illinois C. R. R. Co. v. Maffit*, *supra*, "In a case where the evidence is conflicting and there may be doubt, each party has an indubitable right to have the jury accurately instructed as to the law of the case; not only that his own instructions shall be proper, but those of the opposite party shall be free from error;" and also because it is impossible to know which of the two instructions the jury followed.

Appellee testified voluntarily in her own behalf in regard to the accident and the injuries which she claimed were produced by it, and as to how it injuriously affected her health. On cross-examination this question was put:

"Mrs. Canevin, has any operation been performed upon you—I mean has any abortion been performed upon you within the last twenty years?" To which appellee's counsel objected on the ground that the answer might tend to degrade or criminate the witness, which objection the court sustained.

Appellee was then asked the following questions:

"Has any other physician attended you, or operated upon you at any time?"

Has any physician performed any surgical operation upon you during the past twenty years? Or in the past

seventeen years?" To each of which questions appellee's counsel objected, on the ground that it was not proper cross-examination. The witness had testified, in chief, that she had suffered and still suffered from pain in her neck, head and back, which she attributed to the injuries alleged to have been produced by the accident. She also testified that she had a miscarriage seventeen or eighteen years before the trial.

The appellee having attributed her ailments to the injuries received at the time of the accident, appellant had the right to cross-examine her as to matters occurring before the accident, which might have caused or contributed to cause the suffering of which she complained. It was so ruled by this court in *W. C. St. R. Co. v. Reddy*, 69 Ill. App. 53. The court in that case say: "Where any witness has, expressly or by inference, stated the cause of a result, whether other causes contributed to the result is a proper inquiry on cross-examination." This seems to be a self-evident proposition. The judge who presided at the trial remarked that appellee had virtually stated that "certain physical ailments resulted from the accident," which remark is fully sustained by the evidence. The fact that the plaintiff was the witness intensifies the error, as greater latitude is allowed on the cross-examination of a party than of a disinterested witness. *Ottawa, O. & F. R. V. R. R. Co. v. McMath*, 1 Ill. App. 429.

This disposes of the last three questions. As to the first question, which was objected to by appellee's counsel on the ground that the answer might tend to criminate the witness, the record shows that this objection was not made by appellee herself, but only by her counsel. Greenleaf, commenting on the privilege of a witness to refuse to answer when his answer might criminate him, says: "But the privilege is his own, and not that of the party; counsel, therefore, will not be allowed to make the objection."

To the same effect is *Commonwealth v. Shaw et al.*, 4 Cushing, 595.

When a witness refuses to answer, on the ground that

his answer may criminate him, this is equivalent to a sworn statement that he believes his answer might criminate him, which is not true of a like objection by counsel. But waiving this consideration, the question remains whether appellee had not waived the privilege claimed. It is well settled in criminal cases that if a defendant voluntarily testifies in his own behalf on the merits, he thereby waives his right to protection against compulsory inculcation, and may be required to answer. 1 Greenleaf on Ev., Sec. 451, note a, and cases cited; Wharton on Crim. Evidence, Sec. 432, citing numerous cases; Rapalje on Witnesses, Sec. 269, pp. 443-4; Spies et al. v. The People, 122 Ill. 1, 235.

The rule is the same in civil cases. In *Roddy v. Finnegan*, 43 Md. 490, which was trespass for assault and battery, Finnegan, the plaintiff, took the stand in his own behalf. On cross-examination objection was sustained to a question put to the witness. The court says: "The witness has the privilege of declining to answer a question that might subject him to a criminal prosecution, but this he can waive. It is the privilege of the witness, not of the party. When he is both party and witness for himself, he must be held, in his cross-examination, as waiving the privilege as to any matter about which he has given testimony in chief."

In *Andrews v. Frye*, 104 Mass. 234, one of the plaintiffs testified on his own behalf, and on cross-examination declined to answer a question, on the ground that the answer might criminate him. The lower court did not compel him to answer. On appeal, the court, Gray, J., delivering the opinion, says: "This refusal to answer, like any other refusal to produce evidence in his own power, was competent evidence against him and his partner. A party offering himself as a witness in his own behalf, stands differently in this respect from a third person brought into court to testify in a case in which he has no interest."

In *Chambers v. The People*, 105 Ill. 409, the court holds that a defendant in a criminal case, who testifies as a witness, "is to be examined and cross-examined precisely as other witnesses."

The record contains numerous exceptions to remarks made by appellee's counsel during the trial, and to parts of his closing address to the jury, which, were it not that the errors already mentioned are decisive of the appeal, we would feel it our duty to consider more particularly. We would suggest, however, that, if the case shall be retried, appellee's counsel may not find it disadvantageous to his client to be more observant of decorum in his remarks to the court, and of moderation in his address to the jury.

Judgment reversed and cause remanded.

Simon L. Elzas v. Ada Elzas.

72	94
171	632
72	94
83	519

1. *CONSTRUCTION—Intention Should be Discovered and Enforced.*—It is the duty of the court in construing a contract to discover and give effect to the intention of the parties where it is practicable to do so, so that performance of the contract may be enforced according to the sense in which it was mutually understood at the time it was made, and greater regard should be paid to the clear intent when ascertained than to any particular words which may have been used in the expression of that intent.

2: *MARRIAGE—An Alleged Common Law Marriage Sustained.*—The court reviews the evidence and holds that it sustains the finding of the trial court that appellant and appellee had made a contract of marriage valid under the common law.

Divorce.—Appeal from the Circuit Court of Cook County; the Hon. ELBRIDGE HANEY, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed October 11, 1897.

B. M. SHAFFNER, attorney for appellant.

JOSEPH WRIGHT, attorney for appellee.

MR. PRESIDING JUSTICE ADAMS DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree of divorce rendered in favor of appellee and against appellant. The bill alleges

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that the parties were lawfully married in the city of Chicago in this State in September, 1885, and thereafter lived and cohabited as husband and wife until March, 1891, when appellant willfully, and without reasonable cause, deserted and absented himself from appellee, and has since persisted in such desertion.

The bill also avers that a child, Allen L. Elzas, aged ten years, was born, the issue of said marriage, etc. Appellant answered the bill, denying specifically the allegations of marriage and the birth of a child by him, and generally all the allegations of the bill. The case, by agreement of the parties was heard by the court, without a jury, upon the bill, answer, replication and the testimony of witnesses in open court, and the court rendered a decree in accordance with the prayer of the bill.

The chief and almost solely contested question between the parties, is whether they were lawfully married, as alleged in the bill. It is not claimed by appellee that there was a marriage solemnized as prescribed by the statute, but she claims that there was a marriage valid at common law. The evidence on the question is substantially as follows:

The appellee says that prior to September, 1885, she had been living in what is described in the evidence as a "sporting house," and that appellant, who was a sporting man, gambler and book-maker on the races, had been acquainted with her more than a year, and had visited her every day for about nine months prior to the alleged marriage. Appellee testified as follows: "Well, we had known each other a little over a year at the time, in 1885, and he came generally to see me, and said he thought a great deal of me, and he had spoken of taking me away from the house where I was living, and having me lead a different life; and he asked me if I thought enough of him to be his wife, and I told him yes, I did, and he asked me if I would consider it, think it over, and to let him know, if I made up my mind definitely what to do; so, previous to the month of September, for a month, I had seen him almost continually every

day; in fact, every day I had seen him, and he came to me at that time and told me, he said, 'Ada, I think you think a great deal of me; I do of you, and will you take me as your husband; I want you to settle it; you said you would consider it.' I said, 'Yes, I think enough of you, Sam, to live with you and to be your wife,' and he said, 'Well, from this time'—he said—'I want your consent, and will you accept me as your husband, and, if so, I will take you as my wife,' and I said, 'Yes I will.' I said, 'Who will we get to marry us?' I said, 'I was always brought up an Episcopalian and that church calls for a ceremony.' He said 'There is no ceremony necessary. I am a Jew and you are a Gentile; it would not be more legal if a ceremony was performed; it is only a contract; I agree to take you as my wife,' he said, 'and then we will be husband and wife,' and he then gave me the ring I have. I then consented to be his wife."

Appellee was eighteen years of age at this time. She further testified that appellant, at the close of the conversation above related, which she says occurred September 15, 1885, told her to leave the house where she was then stopping, saying, "Pack up your trunk and get out at once," which she did, and with his consent took rooms in a house on Wabash avenue, where she and appellant lived until April 27, 1886, when she went to her father's residence at Toronto, Canada, to be confined, and remained there until September 18, 1886, when she returned and lived with appellant as his wife, at different places in the city of Chicago, until the time of the alleged desertion.

It does not appear from the evidence that, after the alleged marriage the parties lived in any except respectable places.

July 18, 1886, while appellee was in Toronto, she gave birth to a boy, who was named Allen L. Elzas, which child, she says, was conceived after she removed to Wabash avenue, and after the alleged agreement of marriage, which is consistent with the dates of the alleged marriage and the birth of the child.

Appellee's account of the interview between her and appellant in relation to marriage is corroborated by other witnesses, and by facts and circumstances proven in the case.

Minnie Bailey, appellee's sister, thus testified: "One evening we were sitting in the parlor, and he spoke of having a circumcision performed on the child, as he was a Jew, and my sister objected, and he said, 'That is my wish, I want it done.' My sister said, 'Sam, you want your way in everything,' and she was quite indignant. She said, 'When we were married, we were married without a ceremony, and I don't believe in having him circumcised.' He said to me, 'Minnie, when we were married, we were married without a ceremony.' I said, 'As an Episcopalian, we believe in ceremony.' He said, 'I am a Jew and your sister is a Gentile, and it is not necessary; she is my legal wife as much as though we were married by a rabbi; she had a ring from me.'" The witness also testified that appellee had a ring when she arrived in Toronto.

Dr. E. M. Eiss testified that in the summer of 1890 he, by appellee's request, attended appellant, who was then suffering from an attack of cholera morbus, and that when he, witness, asked appellant for his fee, appellant told him to wait, that his wife would pay it, which appellee subsequently did; that he saw appellant again in March, 1892, at the house where he and appellee were then living, and spoke to him about his, the witness's, bill for medical attendance on the boy, whom he had previously attended, when appellant said the bill would be all right; that his wife would pay it. More than forty letters from appellant to appellee were produced and put in evidence by appellee, the envelopes of most of which, appellee testified, were destroyed, but the address on eleven of them is "Mrs. Ada Elzas," etc. Also a letter was put in evidence from one Joseph F. Ulman, which reads "Mrs. Simon L. Elzas." "At request of Sam I send you \$50." Some of the letters from appellant to appellee were written from Chicago while she was in Canada, and others at times when appellant was absent from Chicago, ostensibly on business. In a large number of the letters he mentions

the boy in the most affectionate terms, and expresses great solicitude for his health and training, and unequivocally admits his paternity. One letter, inclosed in an envelope postmarked New York, January 22, 1891, addressed "Mrs. Ada Elzas," is as follows:

"Dear Allie: Received your letter; there is not your equal here when you are a good boy."

"PAPA."

Indorsed, "Allie Elzas, personal."

In a letter written to appellee while she was in Canada, of date July 21, 1886, three days after the birth of the child, he writes, among other things: "Every one I have told is pleased about the little boy. That little boy shall never want while I have a dollar, and, between us, we can bring him up in good style." Appellant's conduct toward appellee and her child, as evidenced by these letters, was that of an affectionate husband and father, solicitous for the welfare of his wife and child. Appellee testified that appellant introduced her as his wife to his father, to Joseph Ulman and wife, and to different persons, at the house on Wabash avenue, to which they removed after the alleged marriage. The appellant was the only witness for himself, and denied all the material testimony introduced by appellee. His evidence is wholly uncorroborated.

Appellant's counsel, in his argument, contends, first, that the words used in the interview testified to by appellee were *verba de futuro*; in other words, that they related to the future, and did not, of themselves, constitute a marriage; and secondly, that the cohabitation which succeeded the conversation in relation to marriage, must be presumed to have been a mere continuance of the prior illicit intercourse, and without reference to the prior agreement of the parties, or in consequence of it. If the first proposition is unsound, viz., that the words used were used in reference to a future time, then the entire superstructure of the argument, based on that premise, falls to the ground. Bishop says: "An executory contract of marriage is a mutual promise of the parties to intermarry in the future; one executed, is their agreement in due form, to be thenceforward husband

and wife." Bishop on Marriage and Divorce, Sec. 10, Ed. 1891.

The same author says: "Or it is sufficient that the parties, in language mutually understood, or in any way declaratory of intention, accept each other as husband and wife. Even, says Swinburne, if the words do not of their natural meaning 'conclude matrimony,' yet, if the parties intend it and this appears, 'they are inseparable man and wife, not only before God, but also before man.'" *Ib.*, Sec. 320. The text last quoted is cited with approval in *Dickerson v. Brown*, 49 Miss. 357.

It is a familiar and fundamental rule of construction, that "it is the duty of the court, when it is practicable to do so, to discover and give effect to the intention of the parties, so that performance of the contract or other instrument may be enforced according to the sense in which it was mutually understood at the time it was made, and *greater regard is had to the clear intent, when ascertained, than to any particular words which may have been used in the expression of that intent.*" *Field v. Leiter*, 118 Ill. 17, 26.

This rule of construction is referred to because appellant's counsel apparently relies on the fact that some of the verbs in the interview between the parties are in the future tense. But: *Qui haeret in litera haeret in cortice*. Now what was the intention and what the mutual understanding of the parties in the present case, at the time of the interview testified to by appellee? In the first place, the appellant had proposed marriage to the appellee, and requested her to consider the proposal, which it seems she did for about a month's time, at the end of which time, he came to her and asked her if she would accept him as her husband, saying that she had promised to consider it, and that he wanted it settled; she said yes, but thinking that some ceremony was necessary, said, "Who will we get to marry us?" To which he answered that no ceremony was necessary, etc., adding "I agree to take you as my wife, and then we will be husband and wife," and he then gave her a ring, and she says she consented. That appellant intended that appellee should

understand that what had transpired between him and her at that interview constituted marriage between them, is too clear to require argument. She must have so understood appellant, and could not, after that interview, have reasonably expected any future ceremony.

The conduct of the parties immediately after the interview, in removing into another and apparently respectable house, thus effecting a complete change in appellee's mode of life, the introduction by appellant of appellee to others as his wife, his speaking of her and addressing letters to her as such, are all evidence tending to prove that it was their mutual understanding that they were lawfully married.

It is a most pregnant circumstance that, after the birth of the child, he informed his friends of it, as shown by his letter of July 21, 1896. He says: "Every one I have told is pleased about the little boy." He had, apparently, been circulating the, to him, joyful news. It is not in accordance with common experience that the father of an illegitimate child who is, in law, *nullius filius*, is so prompt to publish the paternity of the child, or to manifest pride in the circumstance. But even though it should be conceded that appellee can only claim a marriage *per verba de futuro cum copula*, yet, we are of opinion that the evidence shows a change in the minds of the parties, their mode of life, and their relation each to the other, sufficient to rebut the presumption that their intercourse, subsequent to the date of the alleged marriage, was a mere continuance of the prior illicit intercourse. Bishop, commenting on this presumption, says: "Slight circumstances may show (the slightest ought, within a rule considered in the last chapter, to be pressed into this service) a change in the minds of the parties respecting their connection, resulting in the presumption of marriage, though the intercourse was willfully illicit at first." 1 Bishop on Marriage and Divorce, Sec. 965, Ed. 1891.

The same author disputes the proposition apparently assumed in some of the cases, that marriage can not be pre-

Berkowsky v. Cahill.

sumed from cohabitation and repute when the cohabitation was illicitly begun. *Ib.*, Sec. 977.

Desertion, as alleged in the bill, was abundantly proved. We are of opinion that the allowance of alimony is warranted by the evidence, and is reasonable.

Decree affirmed.

A. S. Berkowsky v. James J. Cahill.

1. LANDLORD AND TENANT—*Effect of Holding Over After Expiration of Term.*—If a tenant holds over after the expiration of his term, the lessor may at his option, either treat him as a trespasser or a tenant for another year upon the terms of the prior lease, and a holding over by a sub-tenant is in legal contemplation, a holding over by the lessee.

2. SAME—*Presumption from Holding Over—How Rebutted.*—The legal presumption of a renewal of a tenancy, resulting from holding over, can not be rebutted by proof of a contrary intention on the part of the tenant alone.

3. EVIDENCE—*The Court Should Be Informed as to What is Proposed to Be Proved by Secondary Evidence.*—When secondary evidence is offered as to the contents of a written instrument, it is clearly necessary for the court to be informed in advance, what is proposed to be proved, in order to pass intelligently on the question of the admissibility of the evidence, and if this is not done, the evidence may properly be excluded.

Transcript, from a justice of the peace. Appeal from the Superior Court of Cook County; the Hon. HENRY V. FREEMAN, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed October 11, 1897.

ALBERT N. EASTMAN, attorney for appellant.

JAMES FRAKE and J. STORKAN, attorneys for appellee.

MR. PRESIDING JUSTICE ADAMS DELIVERED THE OPINION OF THE COURT.

Appellee, by a written lease of date April 23, 1895, demised to appellant, for one year from May 1, 1895, a four-story and basement brick building known as number

72	101
73	30
74	262
75	187
72	101
76	373
79	101
83	322

217 West Twelfth street, in the city of Chicago, at an annual rental of one thousand and eighty dollars, payable in monthly installments of ninety dollars each, on the first day of each and every month of the term, in advance. The appellant sub-let the premises to other persons, who continued to occupy them after the expiration of the lease and until May 4, 1896. Appellant's counsel admits that one of them is still in possession.

Appellee brought suit before a justice of the peace for the rent for April and May, 1896. He recovered judgment for the April rent only, and appealed to the Superior Court, where he recovered judgment for \$145, being the rent for the months of April and May, 1896, less the sum of \$35, which appellee collected from one of the sub-tenants. From the latter judgment appellant appealed to this court.

Appellant admits that he owes the rent for the month of April, 1896, but contends that he does not owe the rent for May, 1896.

The law is well settled that if a tenant holds over after the expiration of his term, the lessor may, at his option, either treat him as a trespasser or a tenant for another year upon the terms of the prior lease; also that a holding over by a sub-tenant is, in legal contemplation, a holding over by the lessee. Taylor on Landlord & Tenant, 8th Ed., Vol. 2, Sec. 524; Clinton Wire Cloth Co. v. Gardner, 99 Ill. 151; Webster v. Nichols et al., 104 Ill. 160, 173; McKinney v. Peck, 28 Ill. 174; Dimock v. VanBergen, 12 Allen, 551.

Appellant's counsel says there are two disputed questions in the case; first, a question of fact; namely, whether Cahill, the lessor, had notice prior to April 30, 1896, of appellant's intention not to retain the premises after May 1, 1896; and, second, a question of law; namely, whether the trial court erred in excluding secondary evidence of a letter claimed to have been mailed by appellant to appellee in April, 1896. The lease from appellee to appellant contains the following provision: "Said party of the second part has the privilege to occupy the above described premises for two years more, after expiration of this lease, upon the same terms and con-

Berkowsky v. Cahill.

ditions contained herein." December 5, 1895, appellant wrote to appellee as follows:

"Dear Sir: You wrote me a short time ago of a man who wanted to rent the store from next May. I am sorry I did not see the man, but if you do see him, you can rent it to him, as I don't think I will keep the building from next May, so that will give you a chance to rent it to any one you like," etc.

Appellant's counsel, who is evidently most solicitous to exclude appellant's liability for two years from April 30, 1896, contends that the letter above quoted is evidence of appellant's intention, at the time the letter was written, not to avail of the privilege to occupy the premises for two additional years, and in this we agree with him. Certainly, had appellee, on receipt of the letter, demised the premises to another, from May 1, 1896, the privilege mentioned would have been lost to appellant. But we do not agree with the contention of appellant's counsel that it is a material question in the present case whether appellant waived the privilege of occupying the demised premises for two additional years. That is not a question presented by the record. It is manifest that a waiver by appellant of such privilege, could not in the least affect his liability, at common law, for holding over after the expiration of the term created by the lease. It is expressly ruled in *Clinton Wire Co. v. Gardner, supra*, that "the legal presumption, from the holding over, of a renewal of the tenancy, can not be rebutted by proof of a contrary intention on the part of the tenant alone."

Appellant's counsel gave to appellee's counsel the following notice: "You are hereby notified to produce upon the trial of this cause the letter written you in January, another one in March, 1896, relative to the renting of premises in controversy herein, and any and all other papers and documents in relation to the leasing or paying of rent of said premises." Appellant called as a witness E. Berkowsky, his son, who testified that within the first ten days of April he wrote for his father two letters to the appellee, addressed

them to him at his residence, and stamped and mailed them. The production of these letters was called for on the trial. Appellee denied having received any letter written in April, or any letter except what he produced on the trial, and his counsel objected on the ground that the notice did not entitle appellant to the production of April letters, the only letters mentioned in the notice being one in January and one in March, 1896, and that the language "all other papers and documents," etc., was too vague, and could only be held to refer to papers and documents other than letters, and the court so ruled.

It is, to say the least, doubtful whether the notice was sufficient to entitle appellant to the production by appellee of any letters except those mentioned in the notice, or to give secondary evidence of the contents of other letters. The rule with regard to such notice is thus stated by Greenleaf: "It must describe the writing demanded, so as to leave no doubt that the party was aware of the particular instrument intended to be called for." Greenleaf on Ev., Vol. 1, Sec. 562.

We deem it unnecessary, however, to pass on the question of the sufficiency of the notice to entitle the appellant to the production of the letters claimed to have been mailed to appellee in April, for the following reasons: Appellant's counsel asked the witness, E. Berkowsky, this question: "Now, what did you state in the letters you wrote in April?" an objection to which was sustained by the court. Appellant's counsel made no statement as to what appellant claimed was contained in the alleged April letters or either of them, nor did he offer to prove that they, or either of them, contained anything relevant or material to the issues in the case. This, of itself, was sufficient reason for the exclusion of secondary evidence of their contents. Had the claimed April letters been produced, it would have been a question for the court, on inspection of the letters, whether they were relevant and material, and when secondary evidence was offered, it was clearly necessary for the court to be informed, in advance, what was proposed to be proved, in

C., R. I. & P. Ry. Co. v. Kendall.

order to pass intelligently on the question of the admissibility of the evidence. *Gaffield v. Scot*, 33 Ill. App. 317; *Cook v. Haussen et al.*, 51 Ib. 269; *Chicago & A. R. R. Co. v. Shenk*, 131 Ill. 283.

But on the hypothesis that the April letters expressly notified the appellee that appellant waived the privilege granted by the lease, and that he would surrender the premises at the expiration of his term, which is the most favorable view for appellant, and goes to the full extent now claimed by his counsel, this would not exclude his legal liability consequent to his holding over after the expiration of his term.

The judgment is affirmed.

Chicago, Rock Island & Pacific Ry. Co. v. E. E. Kendall.

1. **COMMON CARRIERS—When Liability of, Ceases.**—The liability of a railroad company as a common carrier of freight ceases upon the delivery of the car containing the freight on its side track in the usual and customary place for unloading by consignees, if delivery at some other or different place is not required by contract or custom.

2. **SAME—Notice of Arrival of Freight not Necessary to Terminate Liability of Carrier as Such.**—Notice to a consignee of the arrival of goods is not necessary to change the liability of a railroad company from that of a carrier to that of a warehouseman.

3. **BAILMENT—Burden of Proof Where Goods are Not Returned.**—Where a bailee when called upon for articles deposited with him, accounts for a failure to deliver them by showing a loss by some violence, theft, or accident, the proof of negligence or want of due care is thrown upon the bailor, and the bailee is not bound to show affirmatively that he used reasonable care.

Transcript, from a justice of the peace. Appeal from the Circuit Court of Cook County; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the March term, 1897. Reversed and remanded. Opinion filed October 11, 1897.

WALTER W. ROSS, attorney for appellant; ROBERT MATHER and W. T. RANKIN, of counsel.

BISHOP & LOCKWOOD, attorneys for appellee.

PER CURIAM.

This was an action brought by appellee, as owner, against appellant as carrier or bailee of certain hay. The hay was shipped over appellant's road, arrived at point of destination, and was there destroyed by fire before it was received by appellee. Upon its arrival it was placed by appellant upon a "team track," which was shown to be the usual place of delivery in the course of like previous shipments, when no specific place of delivery was pointed out, and none was in this instance.

The consignment consisted of two cars of hay, and upon the placing them upon this team track, they were, while still upon tracks owned by appellant, yet subject to the taking and unloading at any time by appellee.

The cars were placed upon the team track at about nine A. M., and they were destroyed by a fire, which started some blocks away, at about five P. M. of the same day.

Upon this state of facts it would seem that the liability of appellant as a carrier had ended, and that it had become simply a warehouseman. *Gregg v. Ill. Central R. R. Co.*, 147 Ill. 550.

No notice of arrival was necessary to be given appellee in order to change the liability from that of carrier to that of warehouseman. *Ill. Central R. R. v. Carter*, 165 Ill. 570.

The question presented is, therefore, whether the appellant was guilty of such negligence as would constitute a breach of its duty as a warehouseman; and in disposing of this question it becomes necessary to determine upon whom the burden of proof rested; for the record is wanting in evidence showing or tending to show what watchmen, if any, were employed by appellant, to protect its own property and that held by it as bailee, from such dangers. If it could be determined from the record whether proper watchman-service was provided, and when the danger first became known to appellant through its watchman, its liability or non-liability arising from subsequent conduct

could be measured by settled rules. *Leck v. Maestaer*, 1 Campb. 138.

In the absence of any such evidence, it remains to inquire as to whose duty it was to have presented it, viz., whether it was the duty of the plaintiff (appellee) to present evidence to show negligence of its bailee, or the duty of defendant (appellant) to excuse itself from a burden cast upon it by the law upon failure to deliver the property.

There has been a very decided conflict in the authorities upon the question of burden of proof in this class of cases. Story on Bailments, par. 410, page 364, and notes following on page 366.

"The decisions in England and in some of the United States favor putting the burden of proof on the bailor throughout to prove negligence in his bailee. * * * But it should be added that on the other hand the supreme tribunals of several leading States justify * * * the statement that when property placed in a bailee's hands in good condition is returned by him badly damaged, or not returned at all, the burden is upon himself of showing that such diligence was exercised as the bailment required."

The Supreme Court of Massachusetts in *Willett v. Rich*, 142 Mass. 356, repudiates the theory of a shifting of the burden, and asserts the English doctrine, saying: "We understand the doctrine to be well settled in this Commonwealth, that the burden of proof never shifts; and we think that * * * the burden to show negligence was upon the plaintiffs from the beginning and remained upon them throughout the trial."

Our own Supreme Court in *Bennett v. O'Brien*, 37 Ill. 250, a case where the bailment was gratuitous, held that the burden was upon the bailee.

And in *Cumins v. Wood*, 44 Ill. 416, and *Funkhouser v. Wagner*, 62 Ill. 59, the court extended the doctrine to cover cases of bailment for hire.

In *Cumins v. Wood*, the court say: "The only question of law in this record is, as to where lies the burden of proof as to the fact of negligence in an action brought by a bailor against a bailee, in whose hands the goods have suf-

ferred injury. The counsel for appellants, while admitting the authorities to be in conflict, insist that the weight of authority would throw the burden on the bailor. We held the opposite rule to be the more reasonable one in *Bennett v. O'Brien*, 37 Ill. 250, and we are not inclined to depart from that decision. In the present case, perhaps the presumption of negligence was sufficiently rebutted by the evidence in regard to the fire," etc.

The qualification suggested by the last sentence is in accord with the rule as laid down in *Kent's Com.*, Vol. II, 587, viz.: "The bailee, when called upon for the article deposited, must deliver it, or account for his default by showing a loss of it by some violence, theft or accident. When the loss is shown, the proof of negligence, or want of due care, is thrown upon the bailor, and the bailee is not bound to prove affirmatively that he used reasonable care."

In the case under consideration the fact of the fire appearing, and that appellant was in no manner responsible for its origin, the burden was then upon appellee to show affirmatively that appellant was guilty of negligence in order to establish liability.

And this results whether the English doctrine be applied or the *contra* doctrine with the qualification expressed in *Cumins v. Wood*, *supra*, and directly applicable to this case.

The burden resting upon appellee to show negligence, and no such showing having been made, the verdict was unsupported and should have been set aside.

Judgment reversed and cause remanded.

Mr. Justice WINDES took no part in this decision.

Great Northern Hotel Co. v. John Leopold.

1. MASTER AND SERVANT—*When Contract of Employment for One Month is Implied.*—A contract of employment at a certain rate per month implies, in the absence of proof of other terms, a hiring for one month at least.

Great Northern Hotel Co. v. Leopold.

2. *SAME—Attorney's Fees to Servant Suing for Wages.*—The act providing for attorney's fees when an employe brings suit for wages owing according to the terms of an employment, does not apply when the employe sues for damages for a wrongful discharge.

3. *SAME—Special Finding Required When Attorney's Fees are Claimed.*—Under the act providing for attorney's fees, when a servant sues for wages, the jury must find specially that the amount sued for is "earned and due," and is for the wages of such servant.

Transcript, from a justice of the peace. Appeal from the Circuit Court of Cook County; the Hon. THOMAS G. WINDS, Judge, presiding. Heard in this court at the March term, 1897. Affirmed if remittitur be filed, otherwise reversed and remanded. Opinion filed October 11, 1897.

BURNHAM & BALDWIN, attorneys for appellant.

No appearance for appellee.

PER CURIAM.

The appellee has not appeared to resist this appeal.

As appears to us upon an *ex parte* showing, he has recovered \$25, as for a month's wages, when he only claimed that he had earned half that sum, but claimed the other half for being wrongfully discharged before his term was out.

The case was tried by a jury whose verdict was:

"We, the jury, find the issues for the plaintiff, and assess the plaintiff's damages at the sum of twenty-five dollars (\$25)."

The dispute on the trial was whether he was employed for a month, or by the day at the rate of \$25 per month.

There is no preponderance of evidence against the verdict. At the rate of \$25 per month implies—in the absence of proof of other terms—a hiring for one month at least. *Beach v. Mullin*, 34 N. J. L. 343.

In case of wrongful discharge, the servant is entitled to recover as damages the amount of a month's wages, less wages earned, or which might have been earned, elsewhere. *Mount Hope Cemetery Ass'n v. Weidenmann*, 139 Ill. 67.

But on that verdict the court entered judgment—not only for \$25—but also for \$10 attorney's fee. This was error. *World's Col. Ex. v. Thompson*, 57 Ill. App. 606.

The suit was not for wages "earned and due" within the meaning of the statute (3 S. & C. Stat., 2425, par. 57), nor was there any finding by the jury, as contemplated by the statute, that the amount of the verdict was for wages "earned and due."

Upon the appellee remitting \$10 within ten days from the filing of this opinion, the judgment will be affirmed for \$25, appellant to recover all its costs in this court, appellant to recover no other costs; otherwise, the judgment will be reversed and the cause remanded.

Judge WINDES took no part in the decision of this case.

72	110
98	1 55
198	1104

James A. Douglas et al. v. Valentine Hoffman.

72	110
99	1155

1. **PUNITIVE DAMAGES—*Trespassers by Ratification.***—Where several are held jointly liable for a trespass, some by reason of participation and others by reason of ratification only, no punitive damages can be awarded as against such as are liable only because of their ratification after the act.

2. **EVIDENCE—*Of Subsequent Trespasses.***—Evidence tending to show a subsequent trespass is inadmissible where it does not appear that all of the defendants were parties to the second or subsequent trespass.

3. **APPEARANCE—*When Wrongfully Entered.***—Where the appearance of a defendant, not served with process, has been entered and a plea filed for him without his authority or knowledge, such defendant, upon motion supported by proofs, should be allowed to withdraw such appearance and plea.

Trespass, *quare clausum fregit.* Error to the Superior Court of Cook County; the Hon. FARLIN Q. BALL, Judge, presiding. Heard in this court at the October term, 1897. Reversed and remanded. Opinion filed November 2, 1897.

WILBUR & HAUZE, attorneys for plaintiffs in error, contended that where two are defendants in action of trespass to property, and one is chargeable with malice or recklessness, and the other not, exemplary damages can not be awarded against both. *Becker v. Dupree*, 75 Ill. 167; *Grund v. Van Vleck*, 69 Ill. 478; *Pardridge v. Brady*, 7 Ill. App. 639.

Douglas v. Hoffman.

It is held, when only one of two or more defendants, joint wrongdoers, acted in such a way as to render himself liable to exemplary damages, the plaintiff may have judgment against him, but in the case of *McCarthy v. DeArmit*, 99 Pa. St. 63, it was held that if one of the defendants was not liable to exemplary damages none could be given. If defendant acted in good faith, such as acting under advice, he can not be made liable to exemplary damages. *Sedgwick on Damages*, Vol. 1, 382.

As to the relation of court and jury in awarding exemplary damages, whether there is any evidence to justify the assessment of exemplary damages is a question for the court, and if there is none, it is error to submit the question of exemplary damages to the jury. *Selden v. Cashman*, 20 Cal. 56; 1 *Sedgwick on Damages*, 546, and notes.

JOHN W. BYAM, attorney for defendant in error.

The taking of a bill of exceptions is a general appearance in a case. *Young v. Rankin*, 4 How. (Miss.) 27.

The prosecution of an appeal by a defendant not summoned, and who did not appear, is an appearance to the action. *Allen v. Brown*, 4 Metc. (Ky.) 342; *Gill v. Johnson's Adm'rs*, 1 Metc. (Ky.) 649.

The prosecution of a writ of error is an appearance which operates to cure a defective service or return. *Bustamente v. Bescher*, 43 Miss. 172.

MR. JUSTICE SEARS DELIVERED THE OPINION OF THE COURT.

This is an action of trespass *quare clausum fregit* brought by Hoffman, defendant in error, against Adams, Douglas and Marriott, plaintiffs in error.

The trial resulted in verdict and judgment against all the plaintiffs in error for the amount of \$5,000.

It seems probable, if not certain, from the evidence, that the verdict was to a considerable extent for smart money.

The sixth instruction given for the plaintiff in the trial court, informed the jury in effect that if they found the trespass to have been committed under such circumstances as

evinced a disposition on the part of defendants (there) to maliciously and wantonly and willfully commit the same, then exemplary damages might be awarded by way of punishment.

The evidence was such as to leave it a matter of grave doubt whether any of the defendants, save Marriott, participated in the actual force, or had any knowledge of or connection with it until after it had been committed.

The special findings of the jury were inconsistent and conflicting, but by one of them the jury found that Marriott was the one of the defendants in trial court who had actually participated in, advised or counseled the trespass, and, by exclusion, indicated a finding that the other defendants did not so participate, advise or counsel. By another finding they determined that after the trespass had been committed, "the defendants" ratified the same.

In view of the evidence and of these special findings, and of the submission to the jury of the question of punitive damages, it is complained by plaintiffs in error that the court erred in giving certain instructions for defendant in error, plaintiff in the trial court, particularly the second and eighth. These instructions announce, in effect, the proposition that they who ratify a trespass, the actual commission of which they have neither authorized, advised, or in any way participated in, are yet, by reason of such ratification, liable to the same extent as is the one whose trespass they have ratified. They are in part as follows:

"And the court instructs the jury that if they believe from the evidence that the trespass alleged in the plaintiff's declaration was committed by some person or persons professing to act for and in the interest of the defendants in the absence of the plaintiff and against his will, and removed the plaintiff's effects from the rooms in question against the will of the plaintiff, without legal authority so to do, and, further, that immediately after all this had been done, the defendants, knowing the facts, went in, and by themselves, or their agents, took possession of the premises, and retained such possession, this would in law be a ratification by the

defendants of the acts of such other parties, and they would be liable therefor to the same extent as though they had participated in the acts of such other party or parties."

The instruction quoted and another substantially like it, the second, directed the jury incorrectly as to the law. It is well settled that where several are held jointly liable for a trespass, some by reason of participation and others by reason of ratification only, no punitive damages can be awarded as against such as are liable only because of ratification after the act, and a verdict in such case, which assesses punitive damages against all, is bad. *Grund v. VanVleck*, 69 Ill. 478; *Pardridge v. Brady*, 7 Ill. App. 639.

Nor can we view this error as cured by the giving of the ninth instruction for plaintiffs in error.

From the evidence and verdict here, it would seem that the instructions complained of were not only likely to, but probably did, work prejudice to certain of the plaintiffs in error.

It is also claimed that evidence was admitted tending to show a subsequent trespass not participated in by all of the defendants. There can be no question as to the rule that such evidence would be inadmissible when it did not appear that all of the defendants were parties to the second trespass. *Gray v. Waterman*, 40 Ill. 522.

And if it be a matter of contested fact as to whether all of the defendants did or did not participate in the second trespass, the jury should be instructed as to the law governing them in that behalf, so that, if they found that part only of the defendants were connected with the second trespass, they might be directed to disregard all evidence touching such trespass. No such instruction, however, was presented by counsel to the trial court.

The admission in evidence of a receipt signed by one of the defendants in the trial court, is assigned as error. It is as follows: "Saturday, October 29th. Received W. M. Major \$25.50. For seventeen Siphons. F. A. Marriott."

We think the receipt was properly admitted. It bore upon the question of the business carried on by the defend-

ant in error, and the question of date was properly submitted to the jury.

The court properly refused the 10th, 11th, 12th, 13th, 14th and 15th instructions asked by plaintiffs in error, as whatever of them was correct had been sufficiently covered by other instructions given.

Before the trial of the cause a motion was made on behalf of Douglas, one of the defendants in the trial court, by the attorneys who had entered his appearance, for leave to withdraw his appearance and plea. The motion was supported by affidavits showing that the entry of his appearance and the filing of his plea were without authority from him, and that he was not served with process, and was not aware that any such appearance had been entered or plea filed until after trial. The motion was passed upon by a branch of the court other than the trial judge, and denied, and was again presented and denied at the trial. There is no assignment of error by Douglas, but inasmuch as the attention of the court is called to this motion by the briefs of counsel, and as the cause must be submitted to another jury, we deem it proper to indicate that in the opinion of the court this motion should have been allowed. *Leslie v. Fischer*, 62 Ill. 118.

For the error in giving the instructions noted, the judgment is reversed and the cause remanded.

Edgar B. Tolman v. Harry C. Roberts, Trustee.

1. *TRIALS—Issues of Fact Found by the Court.*—The finding of the court upon issues of fact will not be disturbed upon review unless the reviewing court can say that there has been palpable error in weighing the conflicting testimony, and that the finding is not supported by evidence.

2. *SAME—Trials by the Court—Sufficiency of the Evidence.*—In trials by the court without a jury, if the evidence is such as to have sustained a verdict by a jury upon the issue involved, it will be regarded as sufficient to sustain the findings of the trial judge.

Tolman v. Roberts.

3. PROPOSITIONS OF LAW—*Substituting the Belief of the Parties for their Action.*—A proposition of law which substitutes the belief of the parties for their action is properly refused.

Assumpsit, upon a promissory note. Error to the Circuit Court of Cook County; the Hon. EDMUND W. BURKE, Judge, presiding. Heard in this court at the October term, 1897. Affirmed. Opinion filed November 2, 1897.

JOHN MAYO PALMER and JOSEPH B. MANN, attorneys for plaintiff in error, contended that under our statute providing for a defense of the failure or want of consideration, the common law rule against receiving parol evidence to vary the terms of a written contract, has no application, and the door is thrown open to disclose the whole truth about the consideration. *Great Western Ins. Co. v. Rees*, 29 Ill. 272; *Gage v. Lewis*, 68 Ill. 604; *Mann v. Smyser*, 76 Ill. 365; *Broadwell v. Sanderson*, 29 Ill. App. 384; *Peterson v. Johnson*, 22 Wis. 21.

MATZ, FISCHER & BOYDEN, attorneys for defendant in error. No rule is more elementary than that when parties have put their engagements in writing, and without any uncertainty as to the extent of the engagements, it is conclusively presumed that the entire engagements of the parties were reduced to writing. *Union Nat. B. v. Louisville, N. A. & C. Ry. Co.*, 145 Ill. 208; *Laffin v. Howe*, 112 Ill. 253; *Heisen v. Heisen*, 145 Ill. 658.

MR. JUSTICE SEARS DELIVERED THE OPINION OF THE COURT.

This suit was brought upon a promissory note. The defense was failure of consideration, which was pleaded as partial and total. The cause was submitted to the trial court without a jury, and a finding and judgment resulted for defendant in error, plaintiff in trial court.

The errors assigned and urged are the refusing of the 5th and 9th of the propositions of law proffered by plaintiff in error, and that the finding of the court was against the evidence.

The pleas allege that the note (with other notes) was given in accordance with the terms of a written contract for the purchase of certain mines and, among other things, of extracted ore by the plaintiff in error from defendant in error, and that the ore purchased was in large part never delivered, and hence the consideration failed. The contract, which was set forth in these pleas and introduced in evidence, was as follows:

"Know all men by these presents: That the Syndicate Mining and Smelting Company, in consideration of the sum of \$100,000, to wit, paid by Edgar B. Tolman, has sold to said Edgar B. Tolman all right, title and interest of the said Syndicate Mining and Smelting Company to the following described property, to wit: Two (2) silver mines known as the Socobon and Las Juntas mines, in the district of Guadalupe y Calvo, in the State of Chihuahua, Mexico, and all accessories, machinery, tools, implements, including one twenty-ton "Water Jack Smelter," one Pelton wheel and blower, one steam engine and boiler, six furnaces, blacksmith shop building, tools, machinery, carpenter shop, store building, office, store and living rooms, stock of merchandise, power house and contents, burglar proof safe, all mules and pack saddle equipments of said company now remaining on hand, the number of which can not be definitely stated, all the ore already mined from either of said mines, and sacked and stored; all the silver bullion now on hand at said mining camp or elsewhere reduced from any of the ore taken from said mines or either of them, and all chattels, property or rights appertaining to said mines or mining business, or stock of merchandise connected therewith; meaning to sell to said Tolman all the property, real or personal, belonging to said company, transferred to them by said deed of conveyance from one Gad Freeman and Austin B. Reeve, trustee, on the 25th of April, A. D. 1891; the intention of this conveyance being to put said Tolman in said possession of all property and rights now owned by the said Syndicate Mining and Smelting Company, free and clear of all debts at any time incurred by said company. It is, however,

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expressly agreed that said Syndicate Mining and Smelting Company retains a vendor's lien upon all of said property for \$53,500, being the balance due from said Tolman upon the consideration first mentioned, and for which the said Tolman made and executed and delivered to said Syndicate Mining and Smelting Company two certain promissory notes in the aggregate sum of \$53,500, dated March 16th, 1892, payable to the order of H. C. Roberts, trustee, one for \$10,000, and one for \$43,500, due and payable on or before one year after date, which said Tolman covenants and agrees to pay at maturity.

(Signed) THE SYNDICATE MINING AND SMELTING COMPANY,
By ANDREW L. STEELE, President.
EDGAR B. TOLMAN. [SEAL.]

Attest:

EUGENE C. BATES, Secretary. [SEAL.]

It is claimed by plaintiff in error that this written contract does not express all of the agreements between the parties, and that there was a parol agreement which should be taken together with the contract in writing, to the effect that the amount of extracted ore at the place of delivery and covered by the conveyance, was substantially all that had been seen there by Mr. Tolman, plaintiff in error, when he visited and inspected the mines some two years previous to the purchase, less some small amount used in smelting experiments. There is evidence to show that the amount of ore which was actually at the place of delivery at the time of the sale, and afterward delivered to the purchaser, was considerably less than the amount seen there by Mr. Tolman two years before, and was of comparatively insignificant value. The contract of sale was made in Illinois, and the property and place of delivery were in Mexico.

The court held that evidence was admissible to show what the parol agreement was in connection with this written contract, and substantially all the evidence proffered by plaintiff in error in this behalf was admitted. It is needless to discuss the admissibility of this evidence—whether the contract did in terms include all the undertaking of the par-

ties, so that it might not be affected by parol, or whether the alleged parol agreement was by any one empowered to bind the defendant in error, for in no event could plaintiff in error complain of the ruling in this behalf.

An issue of fact was presented by the testimony of the various witnesses, as to whether there was any contract by parol as to the amount of the ore conveyed, or as to the amount conveyed being substantially the same as that previously seen by Mr. Tolman.

It is the rule that the finding of the court in passing upon such issues of fact will not be disturbed upon review unless the reviewing court can say that there has been palpable error in weighing the conflicting testimony, and that the finding is not supported by evidence. If the evidence is such as to have sustained a verdict by a jury upon such issue it will be regarded with quite as much consideration, and as sufficient to sustain the finding of the trial judge. *Story v. Springer*, 155 Ill. 30.

And the same presumptions attach to sustain such finding of the court as would to the verdict of a jury. *Claybaugh v. Hennessy*, 21 Ill. App. 124.

And it will be presumed that the finding was upon those issues upon which the evidence would sustain it. *Wood v. Price*, 46 Ill. 435.

The testimony of the witnesses Bates, Dewey and Steele was such, if the court credited it, as would warrant the court in finding that no contract was entered into by parol as to the amount of extracted ore conveyed. This, we must presume, the court found, and we can not disturb that finding.

The fifth proposition of law, refused by the court, was as follows :

"If all the parties to the said instrument of April 6, 1892, at the time of its execution believed that substantially all the ore which had been purchased by the Syndicate Mining and Smelting Company from Gad Freeman, and which had been added thereto since such purchase, was then sacked and stored at the mines, in said instrument mentioned, then said instrument is to be construed as purporting to convey substantially all of said ore so purchased and added."

It was properly refused. It substitutes the belief of the parties for their action. That one believes a fact does not of necessity imply that he contracts as to the same. These contracting parties may all have believed, as doubtless did Mr. Tolman, that there was extracted ore of great value at the mines, and yet may have declined to obligate themselves by any contract as to such fact.

The refusal to hold the ninth proposition was made a matter of no consequence by the holding of the fourth and eighth. Without discussing the possibility of aiding a *patent* ambiguity by extrinsic evidence, it is enough to say that at the request of plaintiff in error the court had already held that there was no ambiguity, patent or latent, in the writing.

It is unnecessary to pass upon the question of whether the conduct of plaintiff in error, after he had full knowledge of the precise amount of ore received, was such as to constitute a waiver of all matters affecting the consideration of the notes. The finding of the court that there was nothing to waive disposes of such consideration.

The judgment is affirmed.

George A. Weimer, Supervisor, etc., v. People ex rel., etc.

72	119
83	437
72	119
84	114

1. **PRESUMPTIONS**—*When the Evidence is Not Preserved in a Bill of Exceptions.*—Where the evidence has not been preserved in a bill of exceptions the presumption that all the material allegations of the petition were sustained by the evidence, must prevail.

2. **MANDAMUS PROCEEDING**—*An Action at Law.*—A petition for mandamus is an action at law and the judgment is a judgment at law. In order to support the judgment, it is not necessary that a finding of all the material facts should be recited in it.

3. **ERRORS**—*Not Assigned.*—Errors not assigned will not be discussed.

Mandamus.—Error to the Circuit Court of Cook County; the Hon. EDMUND W. BURKE, Judge, presiding. Heard in this court at the October term, 1897. Affirmed. Opinion filed November 2, 1897.

WILLIAM A. BOWLES and THOMAS G. McELLIOTT, attorneys for plaintiff in error.

DAVID S. GEER, attorney for defendant in error.

MR. PRESIDING JUSTICE ADAMS DELIVERED THE OPINION OF THE COURT.

This is error to reverse a judgment of the Circuit Court. The ordering part of the judgment is as follows:

"Therefore, it is ordered that peremptory writ of mandamus issue forthwith, directed to George A. Weimer, supervisor of the town of Lemont, Cook county, Illinois, commanding him forthwith to pay over to Sylvester L. Derby the sum of six hundred and seventy-six dollars and sixty-five cents, with interest thereon at the rate of five per cent per annum from August 20, 1895."

Attorney for plaintiff in error, in his argument assigns three reasons for reversal: first, that certain judgments rendered by a justice of the peace constitute the basis of the petition for a writ of mandamus, and the judgments are void for want of jurisdiction in the justice to render them; second, that the court did not find that there was a demand on the plaintiff in error to pay the claim, and that he refused to pay; and third, that the court did not find that the defendant was in a position to comply with a demand, if made.

The judgments in question were rendered August 20, 1895, and were based on town orders, and were rendered in suits in which defendant in error was plaintiff and the town of Lemont defendant. The validity of the orders is not questioned, but it is insisted that some, at least, of the judgments are void, for the reason that on the return day of the summonses, August 10, 1895, although the defendant then moved for a continuance until August 20, 1895, at 10 o'clock A. M., it does not appear from the transcripts of the judgments that the justice made any orders continuing the cases, and therefore plaintiff in error claims the cases were discontinued and the justice lost jurisdiction.

Plaintiff's attorney contends that the judgments constituted the sole basis of the petition for mandamus and the judgments of the Circuit Court, which contention, if correct, would necessitate inquiry as to the validity of the judgments, but the contention is not sustained by the record.

The case was heard on the petition, answer and replication, and evidence produced in open court. It is averred in the petition, and not denied by the answer, that August 31, 1895, after the judgments were rendered, the relator presented to the board of town auditors of the town of Lemont, certified transcripts of the judgments, and that the board examined the same, in connection with the relator's verified statement of claim, allowed the claim, and ordered the plaintiff in error to pay to defendant in error the sum of \$675.75, with interest from August 20, 1895, at the rate of five per cent per annum; that a tax was levied and collected for said amount, and the amount was received by plaintiff in error, and that afterward, and while he had the same in his possession, the relator made demand on him for payment, and he refused. These facts, if found, fully justified the judgment of the court, even though, as claimed by plaintiff in error, some of the judgments were void for want of jurisdiction. Plaintiff's attorney contends that the orders were merged in the judgments, and also contends that the judgments were void. These propositions are inconsistent and irreconcilable. Each contradicts the other; if the judgments are void, they are nullities, and the orders can not be merged in them; but if the orders are so merged, then it must be because the judgments are valid.

It will be observed that it is averred in the petition that the board of auditors had before them, not only the transcripts of the judgments, but the relator's verified claim, and thus had an opportunity to determine whether the claim was just and the judgments for the correct amounts. It was the duty of plaintiff in error, as the supervisor of the town to pay the claim on demand, he having been ordered

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so to do, and having in his hands the necessary funds. *McCracken v. Lavalley*, 41 Ill. App. 573.

The evidence in the case has not been preserved by bill of exceptions, and therefore the presumption must prevail that all the material allegations of the petition were sustained by the evidence.

We do not agree with the contention that the judgment should recite a specific finding by the court that a demand was made on plaintiff in error and a refusal by him; or that he had funds in his hand with which to pay the relator's claim. A petition for mandamus is an action at law, (*Dement v. Rokker*, 126 Ill. 174; *Board of Supervisors, etc., v. The People ex rel. etc.*, 159 Ill. 242), and the judgment is a judgment at law, and in order to support the judgment, it is not necessary that a finding of all material facts shall be recited in it, or that the evidence should be preserved. The trial court, however, found "from the evidence" that the plaintiff in error unlawfully withheld from the relator the sum of \$676.75, with interest thereon from August 20, 1895.

Plaintiff's attorney says in his printed argument that the court, without the waiver of a jury, entered the judgment in question. It is sufficient to say that this is not assigned as error.

The judgment is affirmed.

Syndicate des Cultivateurs des Oignons a Fleur v. James Currie, Sr., et al.

1. **ATTACHMENT**—*What the Affidavit Must Allege.*—The affidavit for an attachment must allege the several matters necessary to authorize the writ in positive and unequivocal terms. Such allegations can not be made upon information and belief.

Attachment.—Error to the Superior Court of Cook County; the Hon. ARTHUR H. CHETLAIN, Judge, presiding. Heard in this court at the October term, 1897. Reversed and remanded. Opinion filed November 2, 1897.

Syndicate des Cultivateurs des Oignons a Fleur v. Currie.

LOUIS J. PIERSEN, attorney for plaintiff in error, contended that the affidavit for attachment must be positive. Information and belief can not supply the place of positive allegations. Nothing short of positive allegations of the indebtedness and non-residence fulfills the requirements of the statute. *Dyer v. Flint*, 21 Ill. 80; *Archer v. Claffin*, 31 Ill. 306; *Prins v. Hinchliff*, 17 Brad. 153; *Reitz v. The People*, 77 Ill. 518; *Thormeyer v. Sisson*, 83 Ill. 188.

MORSE, IVES & TONE, attorneys for defendants in error.

MR. JUSTICE SEARS DELIVERED THE OPINION OF THE COURT.

This suit is upon contract, was begun by attachment, and resulted in judgment by default against plaintiff in error. No service of process was had save by publication, based upon the affidavit for attachment.

The case turns upon the sufficiency of the affidavit, which is the basis of the attachment proceeding, and of the court's jurisdiction.

The affidavit recites that affiant "is one of the plaintiffs herein, and makes this affidavit on their behalf, that (naming the plaintiffs) have a just demand against Syndicate des Cultivateurs des Oignons a Fleur, a foreign corporation, on account of damages for breach of express contract, and the affiant believes that the plaintiffs (naming them) are entitled to recover of Syndicate des Cultivateurs des Oignons a Fleur, after allowing all just credits and set-offs, seven hundred and seventy dollars and forty-eight cents, which is now due, and that he has good reason to believe and does believe that the said Syndicate des Cultivateurs des Oignons a Fleur is a foreign corporation, and is not a resident of the State of Illinois, and that the place of residence and location of the principal office of the said Syndicate des Cultivateurs des Oignons a Fleur is at Ollioules (Var.), France."

The affidavit for an attachment must allege the several matters necessary to authorize the writ, in positive and unequivocal terms. *Prins v. Hinchliff*, 17 Ill. App. 153.

Nor may these allegations be made upon information and belief alone.

"Information and belief can not supply the place of a positive allegation that the defendant is indebted, or, that he is non-resident." *Dyer v. Flint*, 21 Ill. 80.

The rule can, in principle, be extended as well to cover an allegation upon belief alone. A statement upon belief only, unaccompanied by showing as to whether such belief is founded upon knowledge or information, can not be accepted as a substitute for positive averment.

The statute has been construed to require a positive allegation of non-residence, as a fact within the knowledge of the affiant, and a like allegation of indebtedness as a fact within his knowledge. *Archer v. Clafin*, 31 Ill. 306.

The case *In re Keller*, 36 Fed. Rep. 631, cited, which interprets a statute requiring positive verification, seems, so far as the facts of the case are disclosed, to support the contention of counsel for defendant in error. But we decline to accept that decision as authority *contra* the reasonable and well settled rule of our own State.

The judgment is reversed and the cause remanded.

Joseph N. Emmons v. G. V. Hilton.

1. **ASSIGNMENTS OF ERROR**.—*Must be Based Upon the Record*.—An assignment of error which has no sufficient basis in the record is not well taken.

2. **TRIALS**.—*Right of Argument*.—Where there is an issue in a case to be submitted to a jury, it is error to deprive counsel of the right of argument.

3. **JURY**.—*Right to Pass upon the Credibility of Witnesses*.—The jury are not bound to accept as absolutely true the testimony of any particular witnesses as to any matter in issue. They have the right to pass upon the credibility of such witnesses and in so doing to consider their interest, if any, in the result of the suit.

Suit for Professional Services.—Transcript from a justice of the peace. Error to the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Heard in this court at the October term, 1897. Reversed and remanded. Opinion filed November 2, 1897.

Emmons v. Hilton.

JOHN C. TRAINOR, attorney for plaintiff in error.

ASHCRAFT & GORDON, attorneys for defendant in error.

MR. PRESIDING JUSTICE ADAMS DELIVERED THE OPINION OF THE COURT.

This was a suit by defendant in error against plaintiff in error, commenced before a justice of the peace, for professional services as a physician performed by the plaintiff, Hilton, for the defendant, Emmons. The plaintiff recovered judgment before the justice, and the defendant, Emmons, appealed to the Circuit Court, where the plaintiff again recovered and the defendant sued out a writ of error from this court.

Emmons, the plaintiff here, assigns as error that "the court erred in refusing defendant's counsel the right to examine the last five jurors impaneled." This assignment is based on the following statement in the bill of exceptions: "Objection and exception to the court refusing defendant's counsel an opportunity to examine the last five jurors, and objects to the jury being sworn to try the case. Objection overruled; to which ruling of the court the defendant, by his counsel, then and there duly excepted. Whereupon the court ordered the jury sworn to try the case, and thereupon said jury were sworn to try the case, to which defendant, by his counsel, then and there duly excepted."

This is all the record contains on the subject-matter of the assignment. It is not stated, except perhaps by implication, that the court refused to permit the defendant's attorney to examine the jury. What the court did or said, if anything, to create the impression in the mind of the defendant's attorney that he would not be permitted to examine the jury, is not stated, nor does it appear that he asked or attempted to ask any juror any question against which the court ruled. This assignment has no sufficient basis in the record.

Another error assigned is that the attorney of plaintiff in error was not permitted to address the jury. There was

some conflicting evidence in the case, as the court remarked during the trial, and the court, by submitting the case to the jury, was evidently of the opinion, in which we concur, that the case should be so submitted. This being so, it was the right of plaintiff in error that his attorney should be permitted to argue his case to the jury, and the question is whether the attorney was prevented from so doing. At the close of the evidence, the plaintiff's attorney, Mr. Ashcraft, moved the court to instruct the jury to find for the plaintiff, saying there was no evidence of malpractice, and no reason why the plaintiff should put in any more evidence, when the following occurred :

The Court: "Perhaps that is so, but it is very evident on this matter of the amount of money paid, there is a question."

Mr. Ashcraft: "That would be left to the jury, but it is to instruct the jury on the question of malpractice," etc.

The attorney for plaintiff in error, after asking that the jury should be withdrawn if the motion of defendant's attorney was to be argued, and without waiting for a ruling on that request, proceeded to argue against the motion, and after he had concluded the court said that if there was nothing more to be said (evidently referring to the motion of the plaintiff's attorney) he would give the instruction in writing as requested by the plaintiff, and thereupon the court immediately read to the jury an instruction which will be hereinafter referred to. After the reading of the instruction the attorney for plaintiff in error objected, among other things, that he had been deprived of argument. We are of the opinion that he was so deprived, that in view of what occurred, of the sequence of events in the proceedings, and the apparent absence of any appreciable interval between the decision of the motion and the reading of the instruction, counsel for plaintiff in error had no opportunity to address the jury on the evidence, and the court having held, as do we, that the issues in the case should be submitted to the jury, we are of opinion that the error is well assigned.

The giving of the following instruction is assigned as an error :

"The court instructs the jury that there is no evidence of malpractice or negligence that would warrant the jury in finding for or allowing for any deductions for claim for malpractice or negligence, but the verdict shall be for the plaintiff for the amount the evidence shows to be the usual and reasonable compensation for such services as rendered by the plaintiff to the defendant, less whatever amount the jury may find from the evidence has been paid thereon."

The plaintiff (defendant here) testified to his charges against the defendant, amounting in all to \$90.75, that they were usual charges for such services and were reasonable, and that the defendant had paid him, in all, \$10. The plaintiff also testified to thirty or more visits or attendances on Emmons, and counsel for plaintiff in error, in the abstract, quotes plaintiff in error as testifying, "I paid him cash every time I went to his office." What he did testify was as follows :

Q. "Did you pay him cash every time you went to his office?"

A. "I did pay him cash; yes, sir."

By the answer plaintiff in error may or may not have meant that he paid Dr. Hilton cash every time he went to his office. It is certainly not such a statement that he did so as would sustain an indictment for perjury, if false, but perhaps the jury would have been justified in inferring from the question and answer that the witness intended to be understood as stating that he paid cash every time he went to the doctor's office. Emmons testified that he went to the doctor's office for treatment almost every day from August 3d or 5th till some time in November, and defendant in error testified that Emmons only paid him cash on three several occasions, the payments being, respectively, \$4, \$5 and \$1, or \$10 in all. The only evidence with regard to the reasonableness of the charges made by Dr. Hilton was that of the doctor himself and of Doctor Rockwell, the former testifying to the reasonableness of all the charges,

and the latter to the reasonableness of one charge, which was for the only service of which he had any knowledge. Plaintiff in error called no witness as to the reasonableness of the charges. In view of the evidence, we think the instruction obnoxious to criticism.

The jury were not bound to accept as absolutely true the testimony of the plaintiff's witness that the charges were usual and reasonable; they had the right to pass on the credibility of those witnesses, and in so doing to consider their interest, if any, in the result of the suit, also what services were actually performed by the plaintiff and all facts proven in the case which tended to throw light on the question as to what would be a reasonable compensation.

The language "the verdict *shall* be for the plaintiff for the amount the evidence shows to be the usual and reasonable compensation for such services as rendered by the plaintiff to the defendant, less whatever amount the jury may find from the evidence has been paid thereon," is almost, if not quite, equivalent to instructing the jury to find as compensation the amount which the plaintiff's witnesses had testified to be usual and reasonable, viz., the amount of the plaintiff's bill, less any amount paid. It would seem that both the attorney for the plaintiff and the jury so understood the instruction. Plaintiff's attorney, after the court had read the instruction, remarked in the presence and hearing of the jury, "The amount of the bill is ninety dollars and the credit is ten dollars," and the jury found for the plaintiff for the amount of the bill less ten dollars, or eighty dollars.

It is not difficult to imagine a case in which the plaintiff might testify that charges were reasonable which any disinterested person would at once pronounce unreasonable and out of all proportion to the value of the services rendered. Such cases have occurred and doubtless will again. As to the reasonableness of the charges in the present case, we express no opinion; that will be a question for the jury, if the case shall be retried.

Judgment reversed and cause remanded.

William H. Quinlan et al. v. George Keen et al.

1. AGENT—*When His Knowledge Does Not Affect His Principal.*—The fact that an agent for the sale of lands had knowledge of the existence of a syndicate for the purchase and resale of such lands can not affect his principal.

Bill to Rescind a Contract.—Error to the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding. Heard in this court at the October term, 1897. Affirmed. Opinion filed November 2, 1897.

J. D. HUBBARD, attorney for plaintiffs in error.

DUPEE, JUDAH, WILLARD & WOLF, attorneys for defendants in error.

MR. JUSTICE WINDES DELIVERED THE OPINION OF THE COURT.

Plaintiffs in error, composing the members of a syndicate, filed their bill December 31, 1893, by which they seek the cancellation and rescission of the option contracts below described, and a decree that defendants in error repay them the money paid by plaintiffs in error in the original purchase of the lands in question, or that plaintiffs in error should be allowed the benefit of any profits which Clarke & Co. might make or might have made in connection with the transaction detailed below. In the trial court, as well as in this court, plaintiffs in error admitted in argument they could not be allowed the latter relief, and waived it.

The record shows the following facts, in substance, to wit:

In the latter part of the year 1890, plaintiffs in error entered into an association having for its object the purchase and resale of certain lands in the village of Morgan Park, Cook county, Illinois. This association was organized by Benjamin F. Clarke and George R. Clarke, his half-brother, who induced the various parties to become members and to invest their money in the enterprise. George R. Clarke was

widely and favorably known in the community, and to many of the persons who composed the association. He subscribed for one-quarter of the original capital, and was one of the most active participants in the affairs of the concern. He was elected one of the board of managers and appointed treasurer, with entire charge of its funds. Benjamin F. Clarke was elected secretary, with the usual duties pertaining to the office. The whole plan of this syndicate, originated and was mapped out between these two and in the office of the latter, and the name of George R. Clarke headed the list of subscribers to the articles of association. He was most active in the meetings of the association, prepared the prospectus which was used in obtaining members and selling stock, was its chief promoter and most active manager.

The land was purchased from one George C. Walker, who held the same as trustee for the stockholders of the Blue Island Land & Building Company, a corporation organized under a special charter of the Illinois legislature, and which charter had expired in 1889. Title was taken in the name of William H. Quinlan, for the benefit of the members of the syndicate and for convenience of transfer, but the fact that Quinlan acted in a trust capacity does not appear to have been known to Walker at that time, nor until about one year later. There is no proof that plaintiffs in error didn't know that Clarke & Co. were the agents for the sale of the land, except as hereinafter stated.

The purchase price was \$200,000, \$50,000 being paid in cash and the notes of Quinlan given for \$150,000, payable in installments of \$50,000 each in one, two and three years respectively, with interest at six per cent. At the expiration of the first year the land was still unsold; some of the members were unable to contribute their share of the amount of money which then fell due, and the others could not make payments upon their respective parcels because there had been no partition among the members.

After long negotiation it was agreed that Quinlan should reconvey the land to George C. Walker as trustee, and that

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all of the members of the association should execute quit-claim deeds and surrender their certificates of stock, and that Mr. Walker should execute eighteen options of purchase running to Charles L. Morgan, one of the members of the syndicate, providing that said Morgan or his assigns might purchase the land described therein at certain prices therein stated at any time on or before December 31, 1893.

This plan was finally consummated on or about April 11, 1892.

In May of the same year George R. Clarke died and left his widow, Sarah D. Clarke, his sole legatee and devisee, and Joseph A. Davol, another of the defendants, died prior to the filing of the bill. Benjamin F. Clarke had made a general assignment for the benefit of his creditors and had absconded, and it was impossible to obtain his testimony. William B. Keen, Jr., and George Keen, two other defendants, were so sick that their testimony could not be obtained, and under the statute each and all of the complainants were disqualified from testifying.

About thirty days before the option contracts expired the syndicate held a meeting at the office of its attorney, and it was then and there stated that George R. Clarke, then deceased, was largely interested in the lands bought by the syndicate, through his connection with the firm of Clarke & Co. This was the first time the fact had ever been mentioned at any meeting of the syndicate. This testimony is given by two witnesses called on behalf of the complainants.

George R. Clarke was a member of the firm of George R. Clarke & Co., which firm was composed of George R. Clarke, who owned a one-half interest, George Keen, one-sixth, William B. Keen, Jr., one-sixth, and Joseph A. Davol, one-sixth interest.

There existed a sales contract between the firm of Clarke & Co. and the Blue Island Land and Building Company, which was continually in force from April 15, 1886, and which expired April 30, 1891, under which Clarke & Co. were to receive twenty per cent as a commission on all

lands sold for the Building Company up to a certain upset price mentioned in the sales contract, and that all sums in addition to the upset price were to be divided equally between Clarke & Co. and the Building Company, but Clarke & Co. were to pay all advertising expenses and also to furnish money to build houses as needed, and were never to acquire the land nor any interest in it. The amount of money Clarke & Co. would have been entitled to receive on the sale in question, if it had been consummated, was \$80,343.95, and they did actually receive it out of the first cash payment, and what was advanced to them by Walker subsequently.

In April, 1892, George R. Clarke and the members of the firm of Clarke & Co., on the one hand, and George C. Walker, as trustee for the Building Company, on the other hand, entered into a certain settlement contract, under which it was finally agreed in substance that Clarke & Co. should have advanced to them their share of the profits paid by the syndicate, and that in case the syndicate failed to exercise the options of repurchase that they should be entitled to buy the lands in question; deducting their profits the price would have been a little over half the price to the syndicate.

This settlement contract was entered into by Clarke and his partners on the one hand, and at about the time when Clarke as a partner in the land association was engaged in effecting a settlement with Walker on behalf of said association.

The firm of Clarke & Co. for years occupied a suite of offices in common with George C. Walker, and were intimately associated in business affairs, and the members of the firm were all related to Walker by blood or marriage.

Immediately after the option contracts were executed Walker resigned as trustee for the Building Company, and George Keen, one of the members of the firm of Clarke & Co., became his successor, and while he had ostensibly assigned his interest in that firm to his brother, William B. Keen, Jr., yet it is not claimed that the assignment was for value or was a *bona fide* assignment.

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Walker, as trustee, and the members of the firm of Clarke & Co., claim that they did not know and were under no obligation to inquire whether or not George R. Clarke had explained his interest and the interest of the firm in the lands before the purchase of the same by the association.

Walker did not know of the existence of the syndicate until after the sale and after the delivery of the deed to Quinlan.

Walker was in California from January 10, 1891, to April 15, 1891, but he left Joseph A. Davol and George Keen, two of the members of the firm of Clarke & Co., to represent him in his absence, and in fact he was represented during his absence by George Keen, who, within a short time after the consummation of this sale, became trustee in Walker's place.

It appears from the testimony that George Keen received the various sums of money as they were paid in to him by Benjamin F. Clarke, on behalf of the syndicate; the payments were made by five checks aggregating \$35,813.50, which corresponds closely to the amount received by Benjamin F. Clarke from the various members of the syndicate, as shown by his books of original entry, to wit, \$34,960. The difference between this amount and the \$50,000, the first cash payment to Walker, would represent substantially the amount of George R. Clarke's share, to wit, a one-fourth part of the purchase price, amounting to \$12,500. George R. Clarke continued to transfer portions of his interest at different times, but it is impossible to ascertain from the record the exact amount which he held during the time when these payments were being made.

George Keen made the entries in Walker's books in his absence in his behalf, and as the agent of Walker, trustee, and delivered the deeds in question about February 23, 1891, in the absence of Walker.

The case was heard upon the bill and amendments, answers of the several defendants, and replications to such answers. A cross-bill by Joseph A. Davol and William B. Keen, Jr., and a cross-bill of Sarah D. Clarke were filed, and

also answers to said cross-bills respectively, and replications to such answers, but at the hearing the cross-bill of Davol and Keen was dismissed on their motion, and the cross-bill of Sarah D. Clarke was dismissed for want of prosecution.

The chancellor entered a decree dismissing complainant's bill as amended for want of equity, to reverse which complainants sued out a writ of error in this court.

Plaintiffs in error claim relief on the alleged grounds that they were grossly deceived by George R. Clarke as to the value and salable character of the lands; that he was a promoter and active member of the syndicate of which plaintiffs in error were also members; that the syndicate was organized in pursuance of a plan on the part of Clarke & Co., formed and carried out by them for the purpose of selling the lands at a price greatly in excess of their market value, in order that they might divide among themselves the profits illegally obtained; that this plan was known to Walker, and that the members of the firm of Clarke & Co. carefully concealed from plaintiffs in error the true nature of the relations existing between said firm and Walker, and also concealed the interest which the firm of Clarke & Co. should acquire in said lands upon the sale thereof; that plaintiffs in error first learned of the relations of Clarke & Co. to Walker within thirty days before their bill was filed, and because of the fraud practiced on them by Clarke in the purchase of the land and making of the option contracts, they are entitled to rescind said contracts and recover the purchase money paid by them.

The record fails to show but that plaintiffs in error knew, from the inception of the dealings between them and Clarke, that the firm of Clarke & Co. were the agents for the sale of the land in question, and that there was any concealment or fraud of any kind in this regard. All the evidence pointed out by counsel for plaintiffs in error on this point could be absolutely true and still plaintiffs in error know the fact. The fact that Clarke & Co. were to receive a larger compensation for the sale of this land than is ordinarily paid to real estate agents, can make no difference

whatever, unless there is shown some fraudulent plan or scheme on their part in which Walker participated in some way.

If plaintiffs in error knew of the agency of Clarke for the sale of the lands, and that he was taking a one-fourth interest in the syndicate, they must take notice of the promptings of human nature in the line of interest. The principle is the same whether Clarke's profit by the sale was to be five or fifty per cent. A very different question would be presented had there been proof that there was a concealment of Clarke's agency. For aught that is shown plaintiffs in error knew, from the beginning, of the agency of Clarke & Co. It is unfortunate, perhaps, that the death of Clarke and Davol have debarred them from testifying, but that can not answer for proof.

If plaintiffs in error are entitled to any relief, their claim to the alternate relief prayed in the bill having been waived, it must be based on some participation of Walker in the alleged plan to deceive and defraud them.

The record fails to show that Walker knew of the existence of a syndicate until long after the sale was made and the deed delivered to Quinlan. The fact that his agents for the sale of the lands knew of the existence of the syndicate, can not affect him. If that were the law, an owner could never know when he had made a sale through his agents that would be binding on the purchaser.

We have not discussed the authorities cited by counsel for plaintiffs in error, because we are of opinion they are not applicable to the facts of this case and the relief sought.

The decree of the Circuit Court is affirmed.

Michael J. Moran v. William Peace.

1. **CONTRACTS**—*Under Seal Not to be Modified by Parol Evidence.*—Parol evidence which has the effect of changing or modifying a sealed executory contract is not admissible.

2. **CONTRACTS**—*What is not a Legal Consideration.*—A promise to

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do what one is already under a legal obligation to do, is not a sufficient consideration for a contract.

Action on a Sealed Instrument.—Declaration in assumpsit. Error to the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in this court at the October term, 1897. Reversed and remanded. Opinion filed November 2, 1897.

ESTABROOK & DAVIS, and REMY & MANN, attorneys for plaintiff in error.

Parol testimony is not admissible to change or modify the terms of a contract under seal. *Moses v. Loomis*, 55 Ill. App. 342; *Baltimore & O. & C. Ry. Co. v. Ill. Cent. Ry. Co.*, 137 Ill. 9; *Novak v. Vypomocny Spolek Vlastenac B. & L. Ass'n*, 68 Ill. App. 682; *Wagner v. Maynard*, 64 Id. 239; *Alschuler v. Schiff*, 164 Ill. 298.

H. F., F. A. & H. F. PENNINGTON and P. M. McARTHUR, attorneys for defendant in error, contended that the amount of compensation may be changed by parol from that which is particularly stipulated in a sealed instrument, (*Cooke v. Murphy et al.*, 70 Ill. 96,) and that the subsequent parol agreement was fully executed, and for such reason was properly admitted in evidence, even though it changed the conditions of the contract. Upon this point we cite *Dickerson et al. v. Commissioners*, 6 Port. (Ind.) 128; *Munroe v. Perkins*, 9 Pick. (Mass.) 298; *Dearborn v. Cross*, 7 Cow. (N. Y.) 48; *Latimore v. Harsen*, 14 John. (N. Y.) 330; *White v. Walker*, 31 Ill. 422; *Cooke v. Murphy*, 70 Ill. 96; *Worrell v. Forsyth*, 141 Ill. 22; *Leavitt v. Stern*, 159 Ill. 526.

If the new parol agreement, even though it be without consideration, has been *executed*, and by means thereof one of the parties thereto had been led into a line of conduct which must be prejudicial to his interests, an equitable estoppel arises in his favor. *Mills v. Graves*, 38 Ill. 465; *Young v. Foute*, 43 Ill. 33.

MR. JUSTICE WINDES DELIVERED THE OPINION OF THE COURT.

Defendant in error sued plaintiff in error to recover an amount claimed to be due on account of a contract between them, under seal, for doing some masonry work and furnish-

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ing the materials for the same, on the line of the Chicago & Eastern Illinois Railroad. The declaration was assumpsit and contained only the common counts, to which was pleaded the general issue. The trial resulted in a verdict for defendant in error, on which judgment for the amount of the verdict, \$4,377.79, was rendered in favor of defendant in error.

Various errors are assigned, but only four points are argued in the briefs, viz.:

1. That the court admitted improper evidence on behalf of defendant in error.
2. That the court refused to give proper instructions asked by plaintiff in error.
3. That the court erred in giving to the jury improper instructions, asked by defendant in error; and
4. That the court erred in refusing, on motion of plaintiff in error, to strike out and withdraw from the jury improper evidence, admitted in behalf of defendant in error.

The contract, which is between William Peace of the first part (defendant in error), and M. J. Moran of the second part (plaintiff in error), among other provisions as to the place and details of the work, prices to be paid, and times of payment, contains the following, on which the controversy in this case arises, to wit:

"It is understood by parties hereto that the foregoing prices of masonry are based upon the following agreement of parties as to cost of, and freight rates on, stone to be used therein, to wit: That the necessary stone for said masonry can be secured from quarries at Williamsport and Independence, Indiana, at \$3 per cubic yard, and that the freight rate on such stone from quarries to the work will be 50 cents per ton; if first party is obliged to secure stone from quarries other than those mentioned above, and from such other quarries the rough stone costs more than \$3 per cubic yard, the second party will pay the difference between \$3 per cubic yard and cost of such stone. No stone shall be secured from such other quarries without the written consent of engineer of second party. If freight

rate on stone secured from other quarries than those mentioned above is more than 50 cents per ton, second party will pay, in addition to price above named, the excess of such freight rate above 50 cents per ton. If quarries are found from which the first party can secure satisfactory stone on which freight rate from quarries to the work is less than 50 cents per ton, second party shall deduct such difference in freight rates on stone from prices above named."

The work under the contract ^{Peace (clerk)} was completed and estimates made showing due defendant in error about \$7,100, which was paid except the sum of \$3,779.34, which was retained because it had been ascertained that defendant in error had procured stone *from his own quarry*, instead of obtaining it from quarries at Williamsport and Independence, Indiana, and other quarries mentioned in the contract from which, if he obtained stone, it was contemplated freight on the stone would have to be paid.

^{Moran} Plaintiff in error claimed that, if there was a saving in freight on the stone, by the terms of the contract there should be deducted from the prices mentioned in the contract to be paid for the masonry, the saving in freight thus obtained, which would amount ^{Peace} to the sum retained.

To meet this claim, defendant in error sought to show, and was permitted by the court, against the objection of plaintiff in error, to adduce before the jury evidence to the effect that after the contract was made and the work under it had progressed for some time, there was a verbal agreement between him and plaintiff in error that there should be no deduction from the contract prices; also evidence to the effect that stone from the quarry of defendant in error cost more than \$3 per cubic yard.

This evidence had clearly the effect of changing or modifying the sealed executory contract between the parties by parol, and is not permissible. *Chapman v. McGrew*, 20 Ill. 101; *Loach v. Farnum*, 90 Ill. 368; *Baltimore & O. & C. R. R. Co. v. Ill. C. R. R. Co.*, 137 Ill. 9; *Whiskey Process Co. v. Manhattan Distg. Co.*, 45 Ill. App. 443; *Alschuler v. Schiff*, 164 Ill. 298.

Moran v. Peace.

But it is said by defendant in error the parol agreement was executed and therefore binding between the parties, and citing *Worrell v. Forsyth*, 141 Ill. 22. We think this contention is not sustained by the evidence. The case of *Warrell* was one of equitable estoppel. A necessary element of estoppel is wanting in this, that Peace was not induced to do anything which he was not already bound by his contract to do. He was placed in no position different by reason of the alleged agreement, that he was not in by virtue of his contract.

The verbal agreement was also void, as being without a consideration to support it. Peace was bound by his contract to furnish the stone independent of any agreement on the part of Moran that his estimates should be paid without deduction on account of freight. It is no consideration that one promises to do what he is already under a legal obligation to do. 1 *Chitty on Cont.*, 34, note b, and 61, note x; 3 *Amer. & Eng. Ency. of Law*, 834; *Vanderbilt v. Schreyer*, 91 N. Y. 392; *Conover v. Stillwell*, 34 N. J. Law 54; *Warren v. Hodge*, 121 Mass. 106; *Runnamaker v. Cordray*, 54 Ill. 303; *Smith v. Phillips*, 77 Va. 548; *Phoenix Ins. Co. v. Rink*, 110 Ill. 538; *Havana Press Drill Co. v. Ashhurst*, 148 Ill. 115.

What was said by the Supreme Court in the case of *Bishop v. Busse*, 69 Ill. 403, to the effect that an agreement between an owner and a contractor changing the amount to be paid for building a house under a written contract previously made, was based on a good consideration, where the contractor having stopped work and declined to complete his contract previously made, agreed, if owner would pay an increased price that he would then proceed with his work, must be considered as in conflict with the later, as well as previous decisions of the same court, and therefore overruled by the later cases above cited.

It follows that the instructions given on behalf of the defendant in error were erroneous because they were based upon his supposed right to recover by virtue of the verbal agreement claimed to have been made.

Plaintiff in error complains that the court refused to give an instruction construing the written contract offered in evidence. The contract is plain and unambiguous in its terms. A fairly intelligent jury could understand it without construction. It is a general and elementary rule that the court should construe all instruments placed before the jury, but we are not prepared to hold that the refusal to give the instruction in question was error, as it could harm no one.

For the errors in instructions given on behalf of defendant in error, and the admission of the evidence changing and modifying the contract between the parties, the judgment will be reversed and the cause remanded.

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Frank Dama v. Karl Kaltwasser.

1. PLEADING—*A Defective Declaration Cured by Verdict.*—When anything is omitted in the declaration, though it be matter of substance, if it be such that, without proving it at the trial, the plaintiff would not have had a verdict, and there be a verdict for him, such omission shall not arrest the judgment upon such verdict.

Trespass.—Error to the Superior Court of Cook County; the Hon. NATHANIEL C. SEARS, Judge, presiding. Heard in this court at the October term, 1897. Affirmed. Opinion filed November 2, 1897.

STATEMENT OF THE CASE.

The defendant in error sued the plaintiff in case.

It is averred in the declaration, in substance, that the plaintiff, Kaltwasser, made a contract with one Fort, to construct a building on Fort's lot, and, preliminary thereto, to remove a building then on the front of the lot to the rear of the lot; that the plaintiff employed the defendant, Dama, who was a licensed housemover in the city of Chicago, to remove the building; that the defendant, regardless of his duty in that behalf, employed poor workmen and left them without proper supervision, in conse-

quence of which the building collapsed, fell down and was ruined, and that, by reason of the premises, the plaintiff became liable to pay and did pay to Fort \$519, and was put to other expense, etc.

The defendant, Dama, pleaded the general issue, and a trial was had, resulting in a verdict and judgment for the plaintiff. It does not appear from the record that Dama was present at the trial either in person or by attorney, and the record does not contain a bill of exceptions.

E. S. CUMMINGS, attorney for plaintiff in error.

COWEN & HOUSEMAN, attorneys for defendant in error.

MR. PRESIDING JUSTICE ADAMS DELIVERED THE OPINION OF THE COURT.

The only assignment of error relied on by plaintiff's attorney is that "the declaration is so defective that it will not sustain the judgment." The question whether the declaration is defective is not open for discussion, because if defective, the defect is cured by the verdict. *Lusk et al. v. Cassell et al.*, 25 Ill. 209; *Ill. C. R. R. Co. v. Simmons*, 38 Ib. 242; *Toledo, P. & W. Ry. Co. v. McClannon*, 41 Ib. 238; *Demesmey v. Gravelin*, 56 Ib. 93; *Barker v. Koozier*, 80 Ib. 205; *Clinton W. C. Co. v. Gardner*, 99 Ib. 151.

In *Ill. C. R. R. Co. v. Simmons*, *supra*, which was case for negligence, the declaration did not contain the necessary averment that the plaintiff exercised ordinary care, and the appellant assigned this omission as error, but the court held that the omission was cured by verdict, saying:

"The majority of this court is inclined to the opinion that if the declaration was defective in that particular, it is cured by the verdict. The principle is, 'when anything is omitted in the declaration, though it be matter of substance, if it be such, that, without proving it at the trial, the plaintiff could not have had a verdict, and there be a verdict for the plaintiff, such an omission shall not arrest the judgment,' " citing *Tidd*, *Chitty* and other authorities.

Whether the rule thus announced would apply to a case in which the record purported to contain all the evidence, and in which it appeared that there was no evidence of a fact essential to a recovery, is a question not presented by the record in this case; but that it does apply to cases in which, like the present, the evidence has not been preserved by bill of exceptions, we have no doubt; the presumption being, in the absence of evidence to the contrary, that the trial court would not have allowed the verdict to stand in the absence of proof of all the facts essential to a recovery.

The judgment is affirmed.

Mr. Justice SEARS took no part in the decision of this case.

William Ridges v. City of Chicago.

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1. NEGLIGENCE—*A question for the jury.*—Whether under given facts, the reliance of a servant upon a promise by the master to repair, and continued exposure to the known danger, is or is not negligence, is a question for the jury.

Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in this court at the October term, 1897. Reversed and remanded. Opinion filed November 2, 1897.

MUNSON T. CASE, attorney for appellant, contended that the legal effect of the motion to instruct the jury to return a verdict for the defendant was to admit not only the truth of the evidence of each and every witness, but all the legitimate and natural inferences to be drawn therefrom; and in this connection it is not for the trial court to pass upon the credibility of the witnesses, or hold, where, under the evidence introduced, there is a conflict upon any one question of fact, that the party on whose behalf the evidence is introduced is bound by the testimony of any one witness. If there is evidence tending to prove the contrary, his function is strictly limited to determining whether there is or is not

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evidence legally tending to prove the fact or facts affirmed. He is never authorized to refuse to submit the cause to the jury or to direct a verdict for the defendant unless evidence given at the trial with all the inferences which the jury can justifiably draw from it is so insufficient to support a verdict for the plaintiff that such a verdict if returned must be set aside. *Wenona Coal Co. v. Holmquist*, 152 Ill. 581; *Lake Shore & M. S. Ry. Co. v. Richards*, Id. 59; *Pullman Palace Car Co. v. Laack*, 143 Ill. 242; *Chicago & N. W. R. R. Co. v. Dunleavy*, 129 Ill. 132; *Bartelott v. International Bank*, 119 Ill. 259; *Frazer v. Howe*, 106 Ill. 563.

The master is bound to use reasonable care in providing safe machinery, appliances, surroundings, etc., and the servant, in the absence of notice that the machinery, etc., is unsafe or defective, has a right to rely upon the discharge by the master of his duties in respect to these things. *Wharton on Negligence*, Sec. 211; *Wood on Master and Servant*, Sec. 329; *Chicago & E. I. R. R. Co. v. Hines*, 132 Ill. 161; *Elliott v. Hall*, 15 Law Rep., Q. B. 315; *Pennsylvania Coal Co. v. Kelly*, 54 Ill. App. 622.

He is presumed to have a knowledge of the principles upon which his machinery works, and therefore of the consequences likely to arise from defects of which he has notice. If an accident arises from a defect of which he had notice he can not say that he did not think the defect to be of consequence. *Wood on Master and Servant*, Secs. 329 and 348; *Pennsylvania Coal Co. v. Kelly*, 54 Ill. App. 622.

Under the recent decisions of this court the trial judge erred in directing a verdict. See *Parker v. Lake S. & M. S. Ry. Co.*, 20 Brad. 280; *Lake S. Foundry Co. v. Rakowski*, 54 Ill. App. 213; *Canning v. McMillan*, 55 Ill. App. 232; *Anderson v. Bradley*, 55 Ill. App. 236; *Kimel v. Chicago B. & Q. R. R. Co.*, 55 Ill. App. 244; *Sendzikowski v. McCormick H. M. Co.*, 58 Ill. App. 418; *Ambrose v. Angus*, 61 Ill. App. 304; *Ziegler v. Pennsylvania Co.*, 63 Ill. App. 410; *Broadbent v. Chicago & G. T. Ry. Co.*, 64 Ill. App. 231; *Chicago Edison Co. v. Hudson*, 66 Ill. App. 639; *Swift & Co. v. Fue*, 66 Ill. App. 657; *Lehigh v. World's Col. Ex.*, 67 Ill. App. 28; *Hutchinson v. Chicago & A. R. R.*, 67 Ill. App. 96; *Hines Lumber Co. v. Ligas*, 68 Ill. App. 523.

MILES J. DEVINE, attorney for appellee.

Decisions may be found which hold that if there is any evidence—even a scintilla—tending to support the plaintiff's case, it must be submitted to the jury; but the more reasonable rule which has now come to be established by the better authority, is that when the evidence given at the trial, with all inferences that the jury could justifiably draw from it, is so insufficient to support a verdict for the plaintiff that such a verdict if returned must be set aside, the court is not bound to submit the case to the jury but must direct a verdict for the defendant. *Simons v. Chicago & Tomah R. R. Co.*, 110 Ill. 346, cited and approved in *Lake Shore & M. S. R. R. Co. v. O'Connor*, 115 Ill. 261; *Doane v. Lockwood*, 115 Ill. 490; *Bartelott v. International Bank*, 119 Ill. 271.

A master is bound to inform his servant of all dangers incident to the service of which he, the master, is cognizant, and of which the master is aware and ought to know, which are unknown to the servant and would not be readily ascertainable except by a person possessed of peculiar knowledge, which the master has no reason to suppose the servant possesses. Dangers which are the result of common knowledge, which can readily be seen by common observation, the servant assumes the risk of. *Swift & Co. v. Fue*, 66 Ill. App. 651; *Wood on Master and Servant*, 714, 721; *Richardson v. Cooper*, 88 Ill. 270.

An employe can not recover for an injury suffered in the course of business in which he is employed from defective machinery used therein after he had knowledge of the defect and continued to work, it being held that upon becoming aware of the defective condition of such machinery he should desist from his employment; and if he does not do so, but chooses to continue on, he is deemed to have assumed the risk of such defects, at least when he had not been induced by his employer to believe that the change would be made and had not plainly objected. *Camp Point Mfg. Co. v. Ballou*, 71 Ill. 417; *Chicago & Alton R. R. Co. v. Munroe*, 85 Ill. 25.

The employe is required to establish three propositions to sustain his action:

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1. That the appliances were defective.
2. That the master had notice thereof, or knowledge, or ought to have had such knowledge.
3. That the servant did not know of the defect or risk and had not equal means of knowing with the master. *Goldie v. Werner*, 151 Ill. 551.

Where a servant had knowledge of the risk it must appear that the servant was led to continue the employment by the master's promise that the defect complained of should be remedied. Where the servant does not complain upon his own account and continues in the employment with full knowledge of the risk, he can not recover of the master because the latter, when the defective condition is called to his attention by the servant, gives assurances which do not induce the servant to remain, that the defect should be remedied. *Bailey on Master's Liabilities for Injuries to Servant*, 208, 209; *Missouri Furnace Co. v. Abend*, 107 Ill. 44.

Knowledge of the defect or insufficiency in the machinery or implements must be brought home to the master or proof given that he was ignorant of the same through his own negligence or want of care; or, in other words, it must be shown that he either knew or ought to have known of the defects which caused the injury. *Sack v. Dolese et al.*, 137 Ill. 129.

MR. JUSTICE SEARS DELIVERED THE OPINION OF THE COURT.

The appellant sued to recover for personal injuries alleged to have resulted from negligence of appellee, his employer.

The negligence charged is the furnishing to appellant of an unsafe appliance, viz., a defective clamp, used in the construction of a swinging scaffold upon which appellant worked. Through the giving way of this clamp the scaffold was dropped and appellant was injured.

It is alleged and evidence was given tending to prove that appellant complained of the condition of the clamp in question, and was promised by the foreman of appellee a day or two before the injury, that the defect would be remedied.

Upon these allegations and upon evidence tending to

establish them, the trial court held that no sufficient cause of action was shown, and at the conclusion of the evidence for appellant, directed a verdict of not guilty.

The question presented here is the sufficiency of appellant's case for submission to a jury.

No question is raised as to the duties or the particular office of the "foreman" in this case, or as to the liability in general of the municipality for negligence of such an official in dealing with a subordinate employed in work of the kind shown here.

It would seem from the record and from the arguments of counsel for the parties, that the ruling of the trial court was based solely upon the theory that the danger arising from the defective condition of this clamp came under the application of the doctrine of assumed hazard. The doctrine of assumed hazard is part of the contractual relation between master and servant, in that the servant at the time of his employment impliedly agrees with the master that he will take upon himself all those risks which are ordinarily incident to the nature of his service, in consideration of the wages which are supposedly commensurate with the dangers of the employment.

The negligent conduct of the servant in remaining exposed to a known danger, arising from a particular defect, not part of the risks usually incident to the service, is frequently called an assumption of hazard. It does not come within the general doctrine of assumed hazard; and it does logically come under the doctrine of contributory negligence. But in either event, whichever term be applied to the behavior of the servant, whether it be called an assuming of the hazard or contributory negligence, a fact is presented by this record which might be found by the jury to negative either the assuming of the risk by the servant or contributory negligence upon his part in remaining exposed to it, viz., the promise to repair. Whether under given facts, reliance upon a promise to repair and continued exposure to the known danger, is or is not negligence, is a question for the jury. *Missouri Fur. Co. v. Abend*, 107 Ill. 44, and cases therein cited.

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And if the doctrine of assumed hazard could be invoked, it would still remain a question of fact for the jury, whether the promise, under the given facts, negatived any assumption of the risk.

No matter in the record is brought to our attention by counsel which would afford a sufficient reason in law for withdrawing the case from the jury.

The judgment is reversed and the cause remanded.

Chicago Trust and Savings Bank v. W. P. Black.

1. TRIALS BY THE COURT—*When Conclusive.*—The finding of a trial court, without a jury, the witnesses being before it, will be given like consideration as the verdict of a jury, on controverted questions of fact, unless it is clearly against the weight of the evidence.

2. GUARANTOR—*Liability Same as a Surety.*—It is immaterial whether a guarantor is actually injured by an extension of the time of payment of a note for the benefit of the maker; the rule as to a guarantor is the same as a surety in this regard.

3. PROPOSITIONS OF LAW—*Should not Ask the Court to Pass upon Questions of Fact.*—A proposition of law which requires the court to find on a question of fact, is properly refused.

Assumpsit, on a guaranty. Appeal from the Superior Court of Cook County; the Hon. WILLIAM G. EWING, Judge, presiding. Heard in this court at the October term, 1897. Affirmed. Opinion filed November 2, 1897.

CRATTY BROS., JARVIS & CLEVELAND, attorneys for appellant.

That one of the joint makers of negotiable paper has the right to buy such paper and to sell it, is sustained by the cases of Kipp v. McChesney, 66 Ill. 460, and Gammon v. Huse, 9 Ill. App. 557.

SETH F. CREWS and C. D. F. SMITH, attorneys for appellee, contended that there was such an extension of the time of payment of the note in suit as will release the accommodation makers and the accommodation indorser and guarantor.

The law is thus expressed in Parsons on Notes and Bills, Vol. 1, 239: "If the creditor gives time and forbearance to the principal debtor by a promise which binds him in law, and would bar his action against the debtor, the surety is discharged. For in the first place this essentially varies the terms of the obligation, which ceases to be that for the due discharge of which he became surety. And in the next place, the surety holds as a valuable right, the power of instantly saving himself by suit against the debtor, if he is obliged to pay the debt. If, then, time be given to the debtor and the surety pays, he loses this right because he does not pay from legal necessity. The debtor may say, 'I was not obliged to pay my creditor for three months to come, and why should I pay you?' and thus the creditor has deprived the surety of a right on which he may have depended for his indemnity."

See also *Colgrove v. Tallman*, 67 N. Y. 95; *Millerd et al. v. Thorn*, 56 N. Y. 402; *Bank of Albion v. Burns et al.*, 46 N. Y. 170; *Home National Bank v. Waterman*, 30 Ill. App. 548; 134 Ill. 467; *Reed v. Cramb*, 22 Ill. App. 34; *Price v. Dime Savings Bank*, 124 Ill. 317.

MR. JUSTICE WINDES DELIVERED THE OPINION OF THE COURT.

About November 16, 1886, one Sceets went to appellant for a loan of money by a discount of his note, first asking for \$1,500 and later for \$2,000. He first offered to deposit as collateral security for the loan, 1,200 shares of stock of the par value of \$12,000 of the Knights of Labor Publishing Co., but appellant declined to make the loan, and required other security. He then told Tolman, the president of appellant, that he thought he could get some friends to go on the note with him, and gave the names to Tolman, who, after looking them up, told Sceets they would be satisfactory. He told Tolman the loan was for his, Sceets', personal use, and that the persons who would sign the note with him were simply security. This is not denied by appellant, except inferentially.

Sceets gave his individual note of \$2,000, dated Novem-

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ber 16, 1886, to appellant, payable to his own order and by him indorsed, in which it is stated that he deposited as collateral security with appellant a note of \$2,000, dated *November 11, 1886*, payable in ninety days, signed by himself, Stauber, Florus, Dixon and Stewart, and empowered the legal holder thereof to sell the collateral note in case of default in payment of the original, and also to confess judgment.

At the same time Sceets gave his individual note of \$2,000 to appellant. He also delivered to appellant the note on a guaranty of which appellee is sued in this case, which is the joint and several note of said Sceets, Stauber, Florus, Dixon and Stewart for the sum of \$2,000, dated *November 16, 1886*, payable ninety days after date to the order of appellee, and by him indorsed, in which it is stated that as collateral security thereof there was deposited with said Black 1,200 shares of stock of the Knights of Labor Publishing Co., of the par value of \$12,000, and empowered the legal holder of the note to sell said collateral in case of default in payment of the note, and also to confess judgment. On this note is indorsed a guaranty of payment at maturity, executed by said Black.

Appellee makes the defense that appellant, on the request of the maker or makers of said last mentioned note, without the request of appellee or his assent or knowledge, extended the time of payment thereof for two periods of ten days each, and that he was thereby discharged.

Appellant contended in the trial court, and does here, that the extensions which are admitted to have been made, and on good consideration, were allowed, not on the note in suit, but on the individual note of Sceets, which, it is claimed, was the principal note and the one discounted. The trial was before the court, a jury being waived, and the evidence was conflicting on this point. The finding of the trial court for appellee, the witnesses being before it, should and will be given like consideration as the verdict of a jury on controverted questions of fact, and should stand unless it can be said it is clearly and palpably against

the weight of the evidence. *Snell v. Cottingham*, 72 Ill. 161; *Coari v. Olsen*, 91 Ill. 273; *Kouhn v. Schroth*, 44 Ill. App. 513; *Hall v. Cox*, Id. 382; *Armstrong v. Barrett*, 46 Ill. App. 193.

We deem it unnecessary to detail the conflicting evidence as to which note was discounted or extended. It justified the finding of the trial court in favor of appellee.

The same reasons apply to the second contention of appellant, that the granting time to Sceets would not release Black unless appellant had notice that Black was an accommodation surety for Sceets. The evidence justified a finding that appellant knew Black was an accommodation surety.

It is claimed, but no authorities are cited to support the contention, that the court erred in not holding propositions of law Nos. 2, 4 and 5, submitted by appellant, which are as follows, viz.:

"2. The court is requested to hold as a matter of law that the guarantor of a promissory note is liable to the holder thereof, notwithstanding the holder may extend the time of payment of the note, for the benefit of the maker thereof, after its maturity, if the guarantor has not been injured by the extension.

"4. The court is asked to construe the written papers in evidence according to their legal effect, and to hold that the note signed by George N. Sceets alone was the principal note, and the note signed by Sceets and others, and guaranteed by the defendant, was a collateral note.

"5. The court is asked to hold that the note signed by George N. Sceets alone constitutes a contract between the Chicago Trust and Savings Bank and George N. Sceets, and that when Sceets stated therein that the note guaranteed by the defendant Black was collateral to his note, such statement bound the defendant."

It is immaterial whether a guarantor is actually injured by extension of time of payment of a note for the benefit of the maker. The rule as to a guarantor is the same as a surety in this regard. The second proposition was properly

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refused. 2 Brandt on Suretyship and Guaranty, Secs. 342 and 343; Hurd v. Marple, 10 Brad. 418; Davis v. People, 1 Gilm. 409, and cases cited; Dodgson v. Henderson, 113 Ill. 360.

The fourth proposition was properly refused because it asks the court to find on a question of fact. The fifth proposition was properly refused because there is no reason shown by the record why appellee should be bound by Sceets' statement in his individual note, which appellee testifies he didn't know existed before the 10th or 11th of March, 1887, several months after the loan in question was consummated.

The judgment is affirmed.

H. Albert Lewis v. The County of Cook.

1. **FEES AND SALARIES—Judges of Election.**—The judges of election in Chicago are entitled under the law to the sum of three dollars per day for their services in attending each election.

2. **STATUTES—Repeals by Implication.**—Repeals by implication are not favored. If two statutes are seemingly repugnant, it is the duty of the court to so construe them that the latter shall not repeal the former by implication, and if a construction can reasonably be given by which both acts will stand it will be adopted. The repugnance between statutes must be so clear and plain that they can not be reconciled, to justify a resort to the doctrine of repeal by implication.

3. **SAME—Repeals—General and Special Laws.**—A general law will not be held to repeal by implication a former special law, even when both relate to the same subject-matter.

4. **SAME—Section 2 of Article 7 of the Act of 1885 Not Repealed.**—Section 2 of article 7 of the act approved June 19, 1885, providing that judges of elections shall be allowed and paid at the rate of \$3 per day is not repealed, so far as it relates to the compensation of judges of elections in the city of Chicago, by the amendatory act of 1895, entitled "An act to amend section 68 of an act entitled, 'An act in regard to elections and to provide for filling vacancies in elective offices,' approved April 1, 1872."

Assumpsit, for official fees, etc. Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in this court at the October term, 1897. Affirmed. Opinion filed November 2, 1897.

JULIUS A. JOHNSON, attorney for appellant; H. ALBERT LEWIS, *pro se*.

If a statute is valid it is to have effect according to the purpose and intent of the law maker. The intent is the vital part, the essence of the law. Sutherland on Statutory Construction, Par. 234.

A statute must be interpreted according to its true intent and purpose and its strict letter must be made to yield to its obvious intent. Words, meaningless or inconsistent with intent, otherwise plainly expressed in an act, may be rejected as surplus. *People v. English*, 139 Ill. 622.

In the construction of a statute courts are not confined to the words used, but they regard the purpose, and when necessary to give effect to the meaning of the law, words may be rejected and others substituted. *Peoria & P. U. Ry. Co. v. People*, 144 Ill. 458; *People v. Hoffman*, 97 Ill. 234; *Anderson v. Chicago, B. & Q. R. R. Co.*, 117 Ill. 26.

ROBERT S. ILES, county attorney, attorney for appellee;
FRANK L. SHEPARD, assistant county attorney, of counsel.

MR. PRESIDING JUSTICE ADAMS DELIVERED THE OPINION OF THE COURT.

The appellant, H. Albert Lewis, was a judge of election in Chicago, Cook county, in 1896, and as such served four days, for which he was paid at the rate of three dollars per day, or in all twelve dollars. He claims that, legally, he should have been paid at the rate of five dollars per day, or twenty dollars, and brought suit to recover the difference of \$8.

The general law of this State regarding elections is entitled, "An act in regard to elections, and to provide for filling vacancies in elective offices," approved April 3, 1872, in force July 1, 1872. Revised Stat. 1885, p. 536. Section 63 of this law is as follows:

"The judges and clerks of election shall be allowed the sum of \$3 each per day for their services in attending each election, and the judge who carries the returns to the county clerk shall also receive five cents per mile each way."

In 1885 an act was passed entitled "An act regarding the holding of elections and declaring the result thereof in cities, villages and incorporated towns of this State," approved June 19, 1885, and in force July 1, 1885, Sec. 2 of Art. 7 of which is as follows:

"All judges and clerks of election and official ticket holders, *under this act*, shall be allowed and paid at the rate of \$3 per day." Rev. Stat. 1895, p. 584.

Section 1 of the act provides that the electors of any city may adopt it in the manner prescribed by the act, and it is admitted by counsel for the parties that it was adopted by the city of Chicago and in force in said city prior to 1896.

In 1895 the legislature passed an act entitled "An act to amend section 63 of an act entitled 'An act in regard to elections and to provide for filling vacancies in elective offices,' approved April 1, 1872, in force July 1, 1872," which provides that section 63 of the act of 1872 shall be amended so as to read as follows:

"Section 63. All judges and clerks of election in counties of the first and second class shall be allowed the sum of three (3) dollars per day for their services, and judges and clerks of election in counties of the third class the sum of five (5) dollars each per day for their services." L. 1895, p. 173; 2 S. & C. Stat., p. 1652. Appellee is a county of the third class.

Appellant's counsel contends that Sec. 2 of Art. 7 of the act of 1885 is repealed, in so far as it relates to the compensation of judges in the city of Chicago, by the amendatory act of 1895, above mentioned. If so repealed it must be by necessary implication, because the act of 1895 does not refer to section 2, but purports only to be an amendatory act of section 63 of the act of 1872. All that the act of 1895 purports to do, is to substitute in the act of 1872 the section numbered 63 in the act of 1895, for the section of the same number in the act of 1872. But if the view of appellant's counsel is sound, the effect of the act of 1895 was much more than is expressed. In his view the act of

1895 is to be construed as operating, practically, as an amendment of Sec. 2, Art. 7, of the act of 1885. That section, as originally passed, is as follows: "All judges and clerks of election and official ticket holders, under this act, shall be allowed and paid at the rate of three dollars per day;" but if the position of appellant's counsel be sound, the section must now be read as follows: "All judges and clerks of election, under this act, in cities, villages and incorporated towns, in counties of the first and second class, shall be allowed each the sum of three dollars per day for their services, and judges and clerks of election in cities, villages and towns, in counties of the third class, shall be allowed each the sum of five dollars per day for their services, and all official ticket holders, under this act, shall be allowed each three dollars per day for their services." It will be observed that official ticket holders are not mentioned in the act of 1895. Repeals by implication are not favored.

If statutes are seemingly repugnant, it is the duty of courts to so construe them that the latter shall not repeal the former by implication, and if a construction can reasonably be given by which both acts will stand, it will be adopted. The repugnance between statutes must be so clear and plain that they can not be reconciled, to justify a resort to the doctrine of repeal by implication. The authorities in support of these propositions are too numerous for citation. The following are cited: *Town of Ottawa v. County of La Salle*, 12 Ill. 339; *Board of Supervisors v. Campbell*, 42 Ib. 490; *City of Chicago v. Quimby*, 38 Ib. 274; *Hume v. Gossett*, 43 Ib. 297; *People ex rel., etc., v. Barr*, 44 Ib. 198; *Village of Hyde Park v. Oakwoods Cemetery Ass'n*, 119 Ill. 141; *Butz v. Kerr*, 123 Ib. 659; *Trausch v. Cook County*, 147 Ib. 534.

Assuming, merely for the purpose of discussion, that the amendatory act of 1895 and Sec. 2, Art. 7, of the act of 1885, relate to the same subject-matter, are they so repugnant that they can not be reconciled—that both can not stand? It is manifest that section 2 might have effect in the city, and section 63 of the act of 1872, as amended,

might have effect in that part of the county outside the territorial limits of the city.

In *Village of Hyde Park v. Cemetery Association*, *supra*, it appeared that the Cemetery Association was incorporated in 1853, and was empowered by its charter to acquire land for a cemetery, etc.; that in 1864 it acquired land for that purpose in the town of Hyde Park, and that in 1867 an act was passed amendatory of its charter, which provided that no road, street, alley or thoroughfare should be laid out or opened through the land, or any part thereof, of the association, without its consent. Subsequently, and in 1872, the "Act for the incorporation of cities and villages" was passed and took effect, and the village of Hyde Park, formerly the town of Hyde Park, became incorporated under that act.

By the act of 1872, cities, villages and towns were empowered "to lay out, open, alter, widen, extend, grade, pave, or otherwise improve streets, alleys, avenues, side walks, wharves, parks and public grounds and vacate the same." It is hardly necessary to say that the powers mentioned were, as a general rule, co-extensive with the territorial limits of the municipality. The village attempted to open a street through the land, claiming that the act of 1872 operated to repeal by implication the provision in the act amendatory of the Cemetery Association's charter, prohibiting such opening, but the court decided otherwise, saying, among other things, "The two acts may stand together. Under the general law, all roads and streets in the village are under its control, except the lands of the association, and as to those lands the association has exclusive control." *Ib.* 148.

It is a familiar rule that a general law will not be held to repeal by implication a former special law, even when both relate to the same subject-matter. *Town of Ottawa v. County of La Salle*, *supra*; *Gunnarssohn v. City of Sterling*, 92 Ill. 569; *Butz et al. v. Kerr*, *supra*.

Sedgwick says in reference to this rule, "The reason and philosophy of the rule is, that when the mind of the legislator has been turned to the details of a subject, and he has

acted upon it, a subsequent statute in general terms, or treating the subject in a general manner and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive provisions, unless it is absolutely necessary to give the latter act such construction, in order that its words shall have any effect whatever." Sedgwick on Stat., etc., Construction, 2d Ed., 97-8.

The act of 1885 is not special within the meaning of the constitutional prohibition of special legislation, but it is special in the sense that it applies only to such municipalities as may adopt it; in other words, it applies only to a class. The act in relation to miners, S. & C. Stat., Ch. 93, is a general law, in that it is not within the constitutional inhibition of special legislation; but it applies only to a class, viz., persons employed in coal mines, and the court, comparing it with another act which it was claimed had partially repealed it, said it might "be regarded as special." *Litchfield Coal Co. v. Taylor*, 81 Ill. 590.

Suppose section 2 of article 7 of the act of 1885 to be amended in the most general terms as to the compensation of judges and clerks of election, the title of the amendatory act being limited to the subject embraced in it, could it be reasonably contended that such amendment affected, in the least, section 63 of the act of 1872? Clearly not, because the act of 1885 is, by its terms, limited in its operation to municipalities. The same reasoning applies to the act of 1872, because the act of 1885 also excludes from operation, in municipalities adopting it, the act of 1872, and so limits the operation of the latter act to territory outside of such municipalities.

No case has been cited, or is known to the court, in which an act limited by its title to the amendment of a section of a prior law, and purporting only to amend such section, was held to repeal by implication, or in any way affect any law other than that purported to be amended.

If the act of 1895 had decreased instead of increasing the compensation of judges and clerks of election in counties of the third class, no one would have been heard to contend

that it repealed by implication section 2 of article 7 of the act of 1885.

Section 15, article 1 of the act of 1885, is as follows:

“After and from the time of the adoption of this act, as aforesaid, the provisions of the same shall be applicable to such cities, villages or towns, and all laws in conflict therewith shall no longer be applicable to such cities, villages or towns. But all laws or parts of laws not inconsistent with the provisions of this act shall continue in force and be applicable to any such city, village or town, the same as if this act had not been adopted.” This provision as to the applicability or non-applicability of other laws, of course had reference only to laws in force at the time of the adoption of the act by any municipality, but it evidences the intention of the legislature, at the time of the passage of the act, that the act should be, as nearly as possible, the exclusive law in regard to elections in such cities as might adopt it, and it should be very clear that there has been a change in such legislative intention to warrant the court in so holding. The last sentence of the section quoted was probably inserted out of abundant caution, lest there might be some material omission in the law, which could be cured or supplied by reference to another law. The act of 1885 seems complete in its provisions in relation to its subject-matter, without reference to any other law, and our attention has not been called to any material omission in it.

If another section had been added to the act of 1895, its title remaining the same, expressly repealing so much of section 2, article 7, of the act of 1885, as relates to the compensation of judges and clerks of election, it would be a serious question whether such additional section would not be void, as contravening the constitutional provision that no act shall embrace more than one subject, and that shall be embraced in its title. In such case it could be urged with not a little force, that section 2 relates solely to the compensation of judges and clerks of election appointed and acting under the act of 1885, and that both the original and amended section 63 relate only to the compensation of

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judges and clerks of election appointed and acting under the act of 1872, and so the subjects are different. See *Dolese et al. v. Pierce*, 124 Ill. 140; *People v. Institute of P. D.*, 71 Ib. 229; *Taylor v. Kirby*, 31 Ill. App. 658.

Judgment affirmed.

George E. Crane v. Sherman S. Jewett et al.

1. **FINAL ORDER—*What is Not.***—An order of a Circuit Court in a chancery suit for the surrender of the custody of the fund by a receiver to another officer of the court, made expressly without prejudice to the accounting before the master, and concluding with an intimation that if such order is not complied with by a day certain, the court will treat the receiver as in contempt, is not a final order.

Creditor's Bill.—Error to the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding. Heard in this court at the October term, 1897. Writ dismissed. Opinion filed December 16, 1897.

C. J. MICHELET, attorney for plaintiff in error.

JOHNSON & MORRILL, attorneys for defendants in error.

MR. JUSTICE SEARS DELIVERED THE OPINION OF THE COURT.

This writ of error is prosecuted to review an order of the Circuit Court of Cook County, entered April 10, 1897, which is as follows:

"This cause having come on to be heard upon the motion of certain of the intervening petitioners in the above entitled cause, that the receiver herein pay over to the clerk of this court all moneys in his possession as such receiver, and it appearing to the court that in the decree entered herein on July 3, 1895, it was ordered that the receiver herein pay over to the clerk of this court all moneys in his possession as such receiver, which decree upon appeal has been affirmed by the Appellate and Supreme Courts.

And it further appearing to the court, as shown by the

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reports filed by said receiver, that he has in his hand as such receiver at least the sum of \$294, it is therefore ordered, adjudged and decreed by the court that the said receiver pay over to the clerk of this court, on or before the 15th day of April, 1897, the sum of two hundred ninety-four dollars (\$294), in default of which payment to the said clerk on or before the day mentioned, the said receiver will stand committed for contempt of court, this order, however, being entered without prejudice to the order of reference heretofore entered, concerning the reports and accounts of said receiver."

Prior thereto, and on the 1st day of April, 1897, another order had been entered in the cause as follows:

"Upon the motion of counsel for the receiver in the above entitled cause that all reports and accounts heretofore filed by said receiver in said cause, together with the objections thereto, be referred to a master in chancery of this court, it is ordered by the court that all reports and accounts heretofore filed by said receiver in said cause, together with all objections filed thereto, be referred to Thomas Taylor, one of the masters in chancery of this court, to take testimony, hear arguments and determine as to the correctness and validity of the receipts and disbursements set forth in said reports and accounts, and to settle receiver's accounts and report his findings in reference thereto to this court, with leave to all parties to apply for further orders or directions from time to time."

It is complained by plaintiff in error that the order of April 10th should be reversed because, without any ascertainment (through the hearing ordered before the master) of the amount which plaintiff in error might be allowed, if anything, as fees for receiver, it ordered the entire sum in his hands to be paid over to the clerk, and also because, it is claimed, plaintiff in error is by that order committed for contempt without having first been ordered to show cause.

We think that the order is not subject to objection upon either of these grounds.

It is not final either in respect of the allowance of fees or

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of commitment for contempt. By its terms it is expressly made without prejudice to the accounting before the master. Neither is it final as to commitment of plaintiff in error for contempt. It amounts merely to an order to surrender the custody of the fund to another officer of the court, viz., the clerk, and concludes with an intimation that if the order be not complied with by a day certain, the court will then treat the receiver as in contempt. That in such event another order fixing the manner and term of commitment would be necessary, seems evident, and that such further order, and not this order, would be the final order of commitment, seems equally clear.

The order, to review which the writ of error is sued, not being a final order, and hence not subject to review, the writ of error is dismissed.

Mechanics and Traders Savings Loan and Building Association v. The People ex rel. The Auditor et al.

1. BUILDING AND LOAN ASSOCIATIONS—*Voluntary Liquidation*.—At the meeting of the stockholders of a building and loan association convened by the auditor of public accounts under section 17 b of the act of 1897, relating to Building, Loan and Homestead Associations (Laws 1897, 186), the resolution for reorganization or voluntary liquidation of the association must be passed by a two-thirds vote of the shareholders owning shares then in force. A majority vote is not sufficient.

2. STATUTES—*Rules of Construction*.—In the construction of a statute every part of it must be viewed in connection with the whole so as to make all its parts harmonize, if practicable, and give a sensible and intelligent effect to each.

3. JURISDICTION—*Of the Trial Court After Appeal Taken*.—The Circuit Court has no power, after an appeal from an interlocutory order has been perfected by filing a bond with the clerk as required by statute, to in any manner affect the jurisdiction of the Appellate Court upon such appeal by any order it may enter in the case.

Order Appointing a Receiver.—Appeal from the Circuit Court of Cook County; the Hon. ELBRIDGE HANEY, Judge, presiding. Heard in this court at the October term, 1897. Affirmed. Opinion filed December 16, 1897.

DEFREES, BEACE & RITTER, attorneys for appellant.

PAM & DONNELLY, attorneys for appellee.

LYNDEN EVANS and P. H. O'DONNELL, attorneys for certain stockholders.

MR. JUSTICE SEARS DELIVERED THE OPINION OF THE COURT.

This is an appeal from an interlocutory order appointing receivers of the property and assets of appellant, Mechanics & Traders Savings, Loan and Building Association.

The order was entered in the consolidated cases of Rubel et al. v. Appellant et al. and The People, on the relation of the Auditor of Public Accounts, v. Appellant. The bill of complaint in each of these consolidated cases prays for the appointment of a receiver. The Rubel bill was first filed, but the bill in the name of the people was filed and the order for consolidation entered on the same day that the order appointing receivers was made.

The only errors assigned go to the sufficiency of the bills of complaint, so that we have merely to inquire as to whether either of the two bills is of itself sufficient to warrant the order.

Inasmuch as the conclusion reached upon consideration of the bill filed in the name of the people is determinative of the appeal, we do not deem it necessary to consider the bill filed by Rubel and others.

The order entered in the consolidated cases appointing receivers recites that cause came on to be heard on the application of the complainants for the appointment of a receiver for the defendant association, and that all parties in interest had notice of such application and were present in court, and that "the court having heard the evidence offered in support of said motion and having heard arguments of counsel and being advised in the premises, finds: That an order should be entered appointing temporary receivers of the said Mechanics and Traders Savings, Loan and Building Association, and all its property and assets," etc.

The bill in the name of the people was filed under the act of 1897, relating to building, loan and homestead associations. The group of sections numbered 17a to 17f inclusive, and numbered 19 to 22 inclusive, are the portions of the act necessary to be considered in determining the sufficiency of this bill. Those sections are as follows:

“Sec. 17 a. (Auditor's duty—When assets are impaired, etc.) Whenever it shall appear to the auditor of public accounts that the assets of any association doing business in this State are impaired to the extent that such assets do not exceed the dues paid in on the shares, with interest thereon, at the rate of three per centum per annum, for the average time invested, or that it is conducting its business in a fraudulent, illegal or unsafe manner, he may at once, in either case, appoint a custodian for such association, and shall require of such custodian a good and sufficient bond with sureties to be approved by such auditor.

Sec. 17 b. (Auditor—Custodian—Special meeting of stockholders—Report.) The auditor of public accounts, at the time of the appointment of a custodian for any association as herein provided, shall, within ten days next after having appointed such custodian, convene a special meeting of the shareholders for the purpose of considering and acting upon such special matters as to such special meeting shall seem best. Notice of such special meeting shall be given in the manner and form provided in section 20 of this act, for the calling of special meetings of shareholders. At such meeting, said auditor shall present a full report of the affairs and condition of such association, as found by him from the examination thereof, or as made to him by the custodian.

Sec. 17 c. (Custodian—Duties of—Reports—Compensation.) Such custodian, under the direction of the auditor, shall take possession of the books, records and assets of every description of such association, and pending the further proceedings specified in this act, shall prepare, or have prepared, a full and true exhibit of the affairs, property and condition of such association, including an itemized state-

ment of all its assets and liabilities; and shall receive and collect all debts, dues and claims belonging to it; and may, if necessary, by and with the consent and approval of the auditor, pay the immediate and reasonable expenses of his trust, including his own compensation at not to exceed the sum of ten dollars per diem. Such custodian shall also receive and receipt for all monthly payments becoming due after the date of his appointment, and shall keep the same separate and apart from the other moneys and effects of such association.

Sec. 17 d. (Meeting of Shareholders—Reorganization—New management.) If at the special meeting of the shareholders to be called as herein provided, the shareholders of such association shall vote to reorganize said association, then and in that case the custodian shall upon the consummation of the reorganization thereof, and when the said auditor shall so order and direct, turn over to the new management all the books, papers and effects of every description in his hands belonging to such association.

Sec. 17 c. (Voluntary liquidation—Duty of Auditor and Custodian.) If, at the special meeting of the shareholders to be called and held as herein provided, such shareholders shall vote to go into voluntary liquidation, or to otherwise close up or discontinue the business of such association, such custodian shall, when the auditor shall so order and direct, return to the shareholders all monthly payments received and receipted for by him, and which became due and payable after the date of his appointment; and all books, papers and effects of every description in his hands, belonging to such association, not so returnable, shall, when the auditor shall so order and direct, be turned over and delivered to the person or persons entitled thereto.

Sec. 17 f. (If the Auditor finds that association can not be reorganized, to report to Attorney-General—Duty of Attorney-General—Proceedings.) If the auditor of public accounts, after having called a meeting of the shareholders as in this act provided, shall find that the (the) association can not be reorganized, or that voluntary

liquidation by the shareholders can not be had, or consummated, he shall report the same to the attorney-general, whose duty it shall then become to at once apply to the Circuit Court of the county in which the principal office of such association may be located, or to any of the judges of said court in vacation, in the name of the people of the State, on the relation of said auditor, for an injunction restraining such association from doing further business, and for the appointment of a receiver of such association, and for the dissolution of such association, which application may be made and granted either in term time or in vacation of said court, in the manner now provided for obtaining injunctions, and said cause shall thereupon proceed as other cases in chancery.

Sec. 19. (When association may reorganize or go into voluntary liquidation.) Any association may reorganize or go into voluntary liquidation by the votes of its shareholders owning at least two-thirds of the shares in force at the time such vote is taken. Whenever such shareholders shall desire to reorganize or go into voluntary liquidation, it shall be the duty of the board of directors of such association, or of a committee of shareholders appointed for the purpose, to submit the question of such reorganization or voluntary liquidation to a vote of the shareholders at a special meeting of such shareholders to be called and held as herein provided.

Sec. 20. (When a meeting of shareholders to be called—Notice to be given.) Whenever a meeting of the shareholders is to be called for the purpose aforesaid, it shall be the duty of the board of directors, or of said committee, to convene a special meeting of the shareholders at the principal office of the association, at such time as such directors or committee shall fix and determine. Notice of such meeting shall be given to every member of the association, by depositing in the postoffice, at least ten days before the time fixed for such meeting, a notice properly addressed to each shareholder, at the last recorded address of such shareholder. The directors or committee shall also

use a notice of such meeting to be certified to the auditor of public accounts at the same time that notice is given to the shareholder.

Sec. 21. (Directors to present exhibit of the affairs—To be printed.) Such directors, or committee, shall prepare, or have prepared, a full and true exhibit of the affairs, property and condition of such association, including an itemized statement of its assets and liabilities, which exhibit shall be sworn to by a majority of said directors, or of said committee, before some officer authorized to take acknowledgments of conveyances in this State, such exhibit and report to be printed and a copy thereof mailed along with the notice convening such special meeting. Such original exhibit sworn to as herein provided, shall be filed with the auditor of public accounts of this State, along with a notice of such meeting, at the same time they are mailed to the shareholders.

Sec. 22. (Voting—Adoption of resolution to reorganize or liquidate.) At such special meeting, all votes taken shall be by ballot, and votes of its shareholders owning at least two-thirds of its shares in force at the time such vote is taken, shall be necessary to carry any resolution for the reorganization or liquidation of such association; and if, at such meeting, said shareholders shall, in the manner herein provided, pass a resolution for the reorganization or liquidation of such association, a copy of such resolution, duly certified by the presiding officer and secretary of such meeting, shall be given to, and shall continue (contain) full instructions, and define the authority and compensation of the party or parties to be named therein, to answer and discharge the duties entrusted to them by such resolution; and a like duly certified copy of such resolution, instructions and authority, shall immediately be filed with the auditor of public accounts by the party or parties named in such resolution, before they shall enter upon the discharge of their trust. Before the party or parties named in any such resolution shall assume the duties of their trust, they shall become bounden with two or more good and suffi-

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cient sureties, or in some good and responsible fidelity insurance company, in such sum as the auditor of public accounts of this State shall require and approve."

It will be observed that by section 17 a it is provided that the auditor of public accounts may appoint a custodian of such an association as appellant in certain contingencies specified.

The bill of complaint in question, filed in the name of the people, alleges facts, which, if true, would bring the case within the contingencies specified in this section; and the bill alleges the appointment of a custodian by the auditor.

By section 17 b, it is provided that the auditor shall, within ten days next after having appointed such custodian, convene a special meeting of shareholders, and give notice of such meeting as provided in section 20, and that at such meeting the auditor shall present a full report of affairs and condition of the association as found by him, etc. The bill in question alleges all these things to have been done.

Section 17 e defines certain duties of the custodian.

Section 17 d provides that if at the special meeting of shareholders provided for herein, the shareholders of the association shall vote to reorganize said association, then the custodian shall, upon consummation of reorganization, and when the auditor shall so direct, turn over to the new management all effects, etc., of the association.

And by section 17 e it is provided that if at such special meeting of shareholders, such shareholders shall vote to go into voluntary liquidation, or to otherwise close up or discontinue the business of the association, such custodian shall, when the auditor shall so direct, return to the shareholders all effects, etc., of the association. The bill of complaint here alleges that at the said special meeting of shareholders called by the auditor and held on August 9, 1897, the shareholders refused to pass upon the question as to whether the association should reorganize or go into liquidation; and that at an adjourned meeting held upon August 12, 1897, the question was voted upon, and that no resolution for reorganization or voluntary liquidation was then passed by

a two-thirds vote of the shareholders, owning shares then in force; and the bill further alleges that no special meeting has been called by the directory and officers of said association for the purpose of voting upon such question; that no proper reorganization can be had, and that the association can not go into voluntary liquidation, as provided by this act.

Section 17 f provides that if the auditor, after having called the meeting of shareholders, as hereinbefore provided, shall find that the association can not be reorganized, or that voluntary liquidation by its shareholders can not be had, he shall report the same to the attorney general, whose duty it shall then become to at once apply, in the name of the people and on relation of the auditor, for the appointment of a receiver, etc.

The bill of complaint alleges, as before noted, that neither the reorganization nor the voluntary liquidation contemplated by the act, could in the case of this association be accomplished; and it alleges the report of the auditor to the attorney general with the request to the attorney general that a bill of complaint be filed by him and application be made for a receiver.

The only question raised by appellant as to the regularity of these various proceedings by the auditor, or as to the sufficiency of the bill of complaint, is in relation to the report of the auditor that no reorganization or voluntary liquidation could be effected in accordance with the provisions of the act. It appears from the bill that at the shareholders' meeting called by the auditor and held on August 9, 1897, less than two-thirds of the shares then in force were represented; and that no action was taken relative to reorganization or voluntary liquidation. At the conclusion of that meeting an adjournment was declared (not by the auditor, but by shareholders) to August 12, 1897. At the adjourned meeting held on August 12th, two-thirds of the shares in force were represented; no resolution to reorganize or go into voluntary liquidation was carried by a vote of two-thirds of such shares then in force, but such a resolution was adopted by a majority vote.

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Counsel for appellant contend that a majority vote only was required, and that a two-thirds vote was not essential. In determining this question we dispose of the appeal, for if a two-thirds vote of all shares then in force was essential to decide upon voluntary liquidation or reorganization, then no such decision was here reached; the action of the auditor and the attorney-general was in that event proper, and the bill of complaint, presenting essential compliance with the provisions of the act, was sufficient to warrant the order appointing receivers.

Counsel for appellant concede that if the auditor found that reorganization or voluntary liquidation could not be accomplished, by reason of a failure or refusal of the shareholders to act, then the action of the auditor was proper.

Sec. 19 is entitled "When association may reorganize or go into voluntary liquidation," and it proceeds as follows: "Any association may reorganize or go into voluntary liquidation by the votes of its shareholders owning at least two-thirds of the shares in force at the time such vote is taken. Whenever such shareholders shall desire to reorganize, or go into voluntary liquidation, it shall be the duty of the board of directors of such association, or of a committee of shareholders appointed for the purpose, to submit the question of such reorganization or voluntary liquidation to a vote of the shareholders, at a special meeting of such shareholders, to be called and held as herein provided."

By the provision of Sec. 20, directions are given for the convening of a special meeting of shareholders to pass upon questions of reorganization or liquidation, by direction of the board of directors or by the committee of shareholders, mentioned in Sec. 19.

Sec. 22 provides, among other things, that "at such special meeting all votes taken shall be by ballot, and votes of its shareholders owning at least two-thirds of its shares in force at the time such vote is taken, shall be necessary to carry any resolution for the reorganization or liquidation of such association," etc.

Two different meetings of shareholders are contemplated

by the provisions of the act—either of which might act upon a resolution to reorganize or go into voluntary liquidation, as provided by the act; the one is the meeting called by the auditor, the other a meeting called by the shareholders through their directors or committee.

It is conceded by counsel for appellant, and is too plain for contention, that at a meeting of the latter class, viz., called by the shareholders themselves, a two-thirds vote of shares in force is plainly declared by Sec. 22 to be necessary to carry a resolution to reorganize or go into voluntary liquidation.

But counsel contend that the act contemplates a distinction between the vote necessary to accomplish reorganization or liquidation when taken at a meeting called by shareholders and when taken at a meeting called by the auditor.

We can not assent to such interpretation of the act. The rule is that in the construction of a statute every part of it must be viewed in connection with the whole, so as to make all its parts harmonize, if practicable, and give a sensible and intelligent effect to each. *Potter's Dwarries on Statutes*, p. 144, rule 12.

"A reading of the provisions of the whole statute together may give to earlier sections the effect of restricting the meaning of later ones, as well as to the latter the effect of restricting the operation of the former." *Endlich on Interpretation of Statutes*, Sec. 183; *Williams v. The People*, 17 Ill. App. 274.

To construe the provisions of sections 19 and 22 as requiring a two-thirds vote (as they clearly do), and at the same time construe sections 17 d and 17 e as requiring merely a majority vote to effect the like result, would be inconsistent. Section 19 is evidently a general provision applicable alike to either of the classes of shareholders' meetings provided for, whether called by the auditor or by the shareholders, and by its terms it provides generally how reorganization or voluntary liquidation may be effected. We hold, therefore, that it appears from the bill of complaint that no such resolution as is contemplated by sections

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17 d or 17 e was passed, and therefore, that the bill filed by the attorney-general upon report and request of the auditor, was properly filed, was sufficient in its averments, and the receivers appointed upon the allegation and prayer of that bill were properly appointed.

We have declined to consider any questions raised by argument as to the validity of the statute. Motion has been made to dismiss the appeal, based upon two orders of the Circuit Court entered after the perfecting of this appeal. By one of these orders the appeal bond given upon this appeal was ordered stricken from the files of the Circuit Court; by the other order, so-called "permanent receivers *pendente lite*," were appointed in lieu of the receivers whose appointment is the subject-matter of this appeal.

As to the first order, it is enough to say that the Circuit Court had no power, after this appeal had been perfected by filing bond with the clerk as required by statute, to in any manner affect the jurisdiction of this court upon such appeal by any order it might enter. No approval by the court of the appeal bond taken by the clerk was necessary; neither had the court any power to pass upon its sufficiency or strike it from the files. *Alles P. Co. v. Alles*, 67 Ill. App. 252.

As to the effect of the latter order appointing other receivers in lieu of the ones whose appointment is here in question, the only appeal which could avail appellant was from the first order, viz., the one here appealed from. No subsequent interlocutory order substituting other receivers for the ones first appointed could be reviewed here on appeal. *Intern. Bldg., L. and I. Union v. McGonigle*, decided at this term.

Nor could such interlocutory order of substitution deprive appellant of its right of appeal, whether the receivers thus substituted be called merely temporary receivers or "permanent" receivers *pendente lite*.

The motion to dismiss the appeal is denied.

The order is affirmed.

A. J. Kyle v. The People, etc.

1. **CONTEMPTS—Direct and Constructive.**—Contempts are either direct, such as are offered to the court while sitting as such, and in its presence, or constructive, but tending by their operation to obstruct, embarrass or prevent the due administration of justice.

2. **SAME—Power of Courts to Punish.**—Courts have power to punish direct and criminal contempts, and this power necessarily includes the power to punish indirect, consequential or constructive contempts, such as are acts calculated to impede, embarrass or obstruct the court in the administration of justice.

3. **SAME—Jurisdiction in Error.**—A sentence of imprisonment for a contempt is a judgment in a criminal case, and not being punishable by imprisonment in the penitentiary, is a misdemeanor, and the Appellate Court has, by statute, jurisdiction of all writs of error from final judgments in cases of misdemeanor.

4. **SAME—Judgments Subject to Review.**—Judgments of courts of record in contempt cases are subject to review, and no valid reason can be suggested why contempts committed in the presence of the court should be distinguished from others in this respect, and judgment of fine or imprisonment exempted from the revisory jurisdiction of an appellate tribunal.

5. **JUDGMENTS—Erroneous in Form.**—A judgment in proceedings for contempt which, after the infliction of a fine provides "which he is hereby ordered to pay immediately to the clerk of this court, and in default of which payment to be imprisoned in the jail of this county, and there held for the period of sixty days and until discharged by due process of law, and a commitment issue to carry this judgment into effect," is erroneous, because if committed in default of immediate payment the defendant would have to remain in jail sixty days, even though willing to pay his fine the next day after his commitment, and in addition would be liable for the amount of the fine.

Proceedings for Contempt.—Error to the Superior Court of Cook County. The Hon. JONAS HUTCHINSON, Judge, presiding. Heard in this court at the October term, 1897. Reversed. Opinion filed December 16, 1897.

H. T. ASPERN, attorney for plaintiff in error.

Where the respondent in a common law proceeding, in answer to a rule to show cause why he should not be attached for contempt, denies the entire charge by affidavit, he is entitled to his discharge. It is improper to hear oral

evidence to contradict such affidavit. *Welch v. People*, 30 Ill. App. 399.

In all criminal contempts, if accused denies the charge against him, the court, unaided, can go no further. The sturdy principles of the common law exempt him from submitting an issue of fact to any other tribunal than a jury of his peers with the right of challenge. *Welch v. People*, *Ibid.* 411.

The judgment is void because an unlawful punishment is inflicted.

Section 14, Div. 14, Ill. Crim. Code, provides that when a fine is inflicted the court may order as a part of the judgment that the offender be committed to jail, there to remain until the fine and costs are fully paid or he is discharged according to law.

The sentence is a unity. The imposition of the sixty days imprisonment is the substitute or alternative punishment for the non-payment of the fine and not an independent punishment. That portion of the sentence inflicting sixty days imprisonment being void, the whole is void. *Ex parte Kelly*, 65 Cal. 154; *People ex rel. Stokes v. Riseley, Sheriff*, 38 Hun (N. Y.), 280; *Gurney v. Tufts*, 37 Maine, 130.

CHARLES S. DENKEN, state's attorney, for defendant in error.

A contempt is an offense against the court, as an organ of public justice, and the court can rightfully punish it on summary conviction, whether the same act be punishable as a crime or misdemeanor on indictment or not. *Yates v. Lansing*, 9 Johns. (N. Y.) 417; *U. S. v. Emerson*, 4 Cranch (C. C.), 188.

One of the objects of proceeding by process for contempt, is to punish a contempt already committed, as a past offense, where perhaps the statutes do not cover the case, or in some cases where they do, but where the exigencies of the occasion require a more summary and prompt remedy. *Sharon v. Hill*, 24 Fed. Rep. 726.

Whoever attempts to commit any offense prohibited by

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law, and does any act toward it but fails, or is intercepted or prevented in its execution, where no express provision is made by law for the punishment of such attempt, shall be punished, when the offense thus attempted is a felony, by imprisonment in the penitentiary not less than one, nor more than five years; in all other cases, by fine not exceeding \$300, or by confinement in the county jail not exceeding six months. R. S., Chap. 38, Sec. 273.

MR. PRESIDING JUSTICE ADAMS DELIVERED THE OPINION OF THE COURT.

Plaintiff in error was fined \$250 by the judgment of the Circuit Court for alleged contempt of court, to reverse which judgment this writ of error was sued out.

June 25, 1897, the following affidavit was filed in the lower court:

"William Elmore Foster, being duly sworn, deposes and says: That he is the assistant attorney of the Lake Shore & Michigan Southern Railway Company; that he was present at the trial of the case of H. A. Foster, Adm'r of the estate of George Gierz, deceased, v. the said company, on the 17th day of June, A. D. 1897, before the Honorable Jonas Hutchinson; that on the afternoon of said day, during the progress of the said trial, one A. J. Kyle called affiant aside and asked him if they wished to win the case; that affiant replied that they did; that Kyle then asked affiant if he could see him at his office after court adjourned that afternoon; that affiant requested Kyle to wait a short time, and he would talk with him; that Kyle said he could not wait; that affiant thereupon said he would talk with him at once, and they both went out into the hall; that there Kyle told affiant that he knew two of the jurors in the front row; that affiant made no reply, but immediately turned and went back to the court room.

WM. ELMORE FOSTER.

Subscribed and sworn to before me this 18th day of June 1897.

JOHN A. LINN, Clerk."

June 29, 1897, as appears from the record, a rule was entered, requiring plaintiff in error to show cause within one day why he should not be punished for contempt for doing what is alleged in the foregoing affidavit. The same day plaintiff in error filed the following answer:

" People, etc.,)
 v.)
A. J. Kyle.)

The answer of Arthur J. Kyle to rule to answer for contempt of court, entered before Hon. Jonas Hutchinson, one of the judges of said court. This respondent, Arthur J. Kyle, saving and reserving to himself all manner of exception to the proceedings herein, for answer unto the affidavit of complainant herein, made by one William Elmore Foster, or so much thereof as he is obliged to make answer thereto, answering says, that he is not advised whether William Elmore Foster, affiant in said affidavit of complainant, is an assistant attorney of the Lake Shore and Michigan Southern Railway Company, or not, or whether he was present at the trial of the case of H. A. Foster, administrator of estate of George Gierz v. the said company, on the 17th day of June, A. D. 1897, before Hon. Jonas Hutchinson, or not. And that if said acts be necessary or pertinent to the issue herein, that strict proof may be required of the same. This respondent further answering under oath states that he did not, on the afternoon of said day, during the progress of the trial of the aforementioned case, call said William Elmore Foster and ask him if they wished to win the case; and denies that said Foster replied that they did; and denies that this respondent asked said William Elmore Foster if this respondent could see him, said Foster, at his office after court adjourned that afternoon; but admits that William Elmore Foster did request this respondent to wait a short time and he would talk with this respondent; and this respondent did state in reply to said Foster that he could not wait; and admits that said Foster said he would talk to this respondent at once; and that both said Foster and this respondent did then and there go out into the hall, but that

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the going out into said hall to talk was at the instigation and request of said Foster.

This respondent further answering denies that he then told said Foster he knew two of the jurors in the front row, and denies that thereupon the said Foster made no reply and immediately turned and went back to the court room.

This respondent further answering says that on the day in question he went into the court room of the Hon. Jonas Hutchinson on business connected with his employment by G. Porter Johnson, general counsel of the London Guarantee & Casualty Company, and for no other purpose.

This respondent further says that he did nothing wrong, that he intended to do nothing wrong, and that nothing he did can be construed into wrong, but that all his acts in said court room, at said time, were right and honorable and consistent with his duties.

And now having specifically and formally answered each and every allegation of the complaint on file herein, prays that the rule herein entered against the respondent be discharged, and that this respondent be dismissed and discharged from the custody of this court.

ARTHUR KYLE."

"STATE OF ILLINOIS, }
County of Cook, } ss.

Arthur J. Kyle, the respondent herein, being duly sworn, deposes and says that he has read the foregoing answer by him subscribed, and that the said answer so subscribed by this affiant is true in substance and in fact.

ARTHUR J. KYLE.

Sworn to and subscribed before me this 29th day of June, 1897.

JOHN A. LINN, Clerk."

It will be observed that the date of the *jurat* is June 29th. The order to show cause was, in fact, entered June 29th, and the answer of plaintiff in error was filed the same day, but by agreement of counsel the order was entered as of June 25th, and the answer filed as of June 26th, for what reason does not appear.

Plaintiff in error, on filing his answer to the rule to show cause, moved, by his counsel, that he be discharged, on the ground that, by his sworn answer, he had purged himself of contempt; but the court overruled said motion, and proceeded to hear, and heard, the testimony of witnesses on the issues of fact made by the affidavit of Foster and the answer of plaintiff in error. Plaintiff in error rested on his answer, produced no evidence in support thereof, and the court, on the conclusion of the evidence for the people, entered an order, which, after reciting certain findings of fact, concludes as follows:

"And so the court finds that said A. J. Kyle is guilty of contempt of the Superior Court of Cook County, Illinois, in doing as herein found, and he is hereby fined for such contempt the sum of \$250, which he is hereby ordered to pay immediately to the clerk of this court, and in default of which payment he be imprisoned in the jail of said county and there held for the period of sixty days and until discharged by due process of law, and a commitment issue to carry this judgment into effect."

Counsel for defendant in error contend that the matter charged in the affidavit of Foster was a direct contempt of court, and can be reviewed, if at all, only for the purpose of ascertaining whether the court had jurisdiction, and that if the court had jurisdiction, the judgment is conclusive. Blackstone, commenting on the law of contempt, says:

"The contempts that are punished are either direct, which openly insult or resist the power of the courts, or the persons of the judges who preside there, or else are consequential, which (without such gross insolence or direct opposition) plainly tend to create an universal disregard of their authority." 4 Bl. Com. 283. The same author, after enumerating certain classes of contempts, says: "Some of these contempts may arise in the face of the court, as by rude and contumacious behavior, by obstinacy, perverseness or prevarication; by breach of the peace, or any willful disturbance whatever." *Ib.* 285. Of the mode of procedure in cases of contempt, he says:

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"If the contempt be committed in the face of the court, the offender may be instantly apprehended and imprisoned, at the discretion of the judges, without any further proof or examination. But in matters that arise at a distance, and of which the court can not have so perfect a knowledge, unless by the confession of the party or the testimony of others, if the judges upon affidavit see sufficient ground to suspect that a contempt has been committed, they either make a rule on the suspected party to show cause why an attachment should not issue against him, or, in very flagrant instances of contempt, the attachment issues in the first instance, as it also does if no sufficient cause be shown to discharge; and thereupon the court confirms, and makes absolute, the original rule. This process of attachment is merely intended to bring the party into court; and, when there, he must either stand committed, or put in bail, in order to answer upon oath to such interrogatories as shall be administered to him, for the better information of the court with respect to the circumstances of the contempt. These interrogatories are in the nature of a charge or accusation, and must by the course of the court be exhibited within the first four days; and, if any of the interrogatories is improper, the defendant may refuse to answer it, and move the court to have it struck out. If the party can clear himself upon oath, he is discharged; but, if perjured, may be prosecuted for the perjury." *Ib.* 287.

"Contempts are either direct, such as are offered to the court while sitting as such, and in its presence, or constructive, but tending by their operation to obstruct, embarrass, or prevent the due administration of justice." *Stuart v. The People*, 3 Scam. 395.

Church thus distinguishes between direct and constructive contempts: "Courts have an undoubted power to punish direct and criminal contempts, and this power to punish direct or criminal contempts also necessarily includes the power to punish indirect, consequential or constructive contempts—such acts as are calculated to impede, embarrass, or obstruct the court in the administration of justice." *Church on Habeas Corpus*, Sec. 307.

We are of opinion that the alleged conversation between plaintiff in error and Foster, as related in the latter's affidavit, assuming for the present the truth of the affidavit, was not a direct contempt of the court. But even though it should be conceded that there was a direct contempt of the court, the law is not, as claimed by counsel for defendant in error, that the judgment is not reviewable on error. The contrary doctrine has been expressly held and practically applied by this court. In *Rawson v. Rawson*, 35 Ill. App. 505, 506, which was direct contempt of the court, committed in the presence of the court, the court say:

"In *Stuart v. The People*, 3 Scam. 395, the Supreme Court took jurisdiction to review a judgment of the Circuit Court in a contempt proceeding on a writ of error, on the ground that the court had power under the statute to review the final judgment of any inferior court of record in the State, where the judgment decides the right of property or of personal liberty. A contempt is a criminal offense, and a sentence of imprisonment for a contempt is a judgment in a criminal case. Such an offense not being punishable in the penitentiary, is a misdemeanor, and this court has, by statute, jurisdiction of all writs of error from final judgments in this district in misdemeanors. *McDonald v. The People*, 25 Ill. App. 350; *Beattie v. The People*, 33 Ill. App. 651.

It was the constant practice of the Supreme Court to review on error the judgments of the Circuit Court and of the Criminal Court of Cook County in contempt matters before the establishment of the Appellate Court, and it has been the practice of this court to review such judgments whenever the record of such a case has been presented and error assigned. It is, then, the established law of this State that judgments of courts of record in contempt are subject to review. It is true that none of the reported cases appear to have been contempts committed in the presence of the court, but if contempts are subject to review at all, no valid reason can, as we believe, be suggested why contempts committed in the presence of the court should be distinguished from others in that regard, and judgments of fine or

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imprisonment therein exempted from the revisory jurisdiction of an appellate tribunal. A court is just as liable to err against the accused in a proceeding to punish him for a direct contempt, as for a constructive one; and, as the Supreme Court said in *Stuart v. The People*, *supra*, 'perilous, indeed, would be the condition of the citizen, if he had not the privilege in such a case to have it reviewed by another tribunal, and defective would be our jurisprudence if it afforded no means of relief.' See also *Stuart v. The People*, 3 Scam. 395; *Ex parte Thatcher*, 2 Gilm. 167; *Ex parte Smith*, 117 Ill. 63.

In *Ex parte Thatcher*, *supra*, the court plainly intimate that the reviewing court may inquire whether the acts claimed to have been a contempt, were or were not a contempt in law, saying: "The court may not treat any and every act as a contempt, and I have no doubt that the Appellate Court may revise and reverse its judgment when it exceeds its jurisdiction, by treating that as a contempt which, in law, is no contempt and can not be. The supervision will be to ascertain that fact." *Ib.* 170. This statement of the court is supported by the authorities.

In *People v. Kelly*, 24 N. Y. 74, which was an appeal by Hackley from a judgment of the lower court, on habeas corpus, remanding him to the custody of the sheriff, the court, Davis, J., delivering the opinion say:

"As a general rule, the propriety of a commitment for contempt is not examinable in any other court than the one by which it was awarded. This is especially true where the proceeding by which it is sought to be questioned is a writ of habeas corpus, as the question on the validity of the judgment then arises collaterally, and not by the way of review. The habeas corpus act, moreover, declares that where the detention of the party seeking to be discharged by habeas corpus appears to be for any contempt, plainly and specially charged in the commitment, ordered by a court of competent jurisdiction, he shall be remanded to the custody in which he was found. But this rule is of course subject to the qualification, that the conduct charged as

constituting the contempt must be such that some degree of delinquency or misbehavior can be predicated on it; for if the act be plainly indifferent or meritorious, or if it be only the assertion of the undoubted right of the party, it will not become a criminal contempt by being adjudged to be so. The question whether the alleged offender really committed the act charged, will be conclusively determined by the order or judgment of the court; and so with equivocal acts, which may be culpable or innocent according to the circumstances; but where the act is necessarily innocent or justifiable, it would be preposterous to hold it a cause of imprisonment."

It has been held even on habeas corpus, where the power of the court is much more restricted than on error or appeal, if the facts stated in the warrant, or return, which are claimed to have constituted a contempt, do not, in legal contemplation, constitute a contempt, the prisoner should be discharged. Church on Habeas Corp., Sec. 341.

In such case, the remedy in this State would be by writ of error.

Counsel for defendant in error has cited a number of cases in which the courts, on habeas corpus, refused to review the judgments of courts of record having jurisdiction in the premises. Such cases have no application for a two-fold reason. The proceeding by habeas corpus is collateral to the judgment imposing the imprisonment, and the court is restricted to certain inquiries. The judgment can not, in such proceeding, be impeached for mere error or irregularity. The distinction between the power of the court on habeas corpus and on error to review the judgment, is recognized in *Ex parte Smith, supra*, the court saying:

"We regard the petition in this case as a mere attempt to review and set aside a judgment at law for an alleged error in the proceeding, where the court clearly had jurisdiction both of the person and subject-matter of the suit. This can not be done. The petition shows that the petitioner was regularly brought before the grand jury as a witness, that he refused to answer certain questions propounded to

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him, and that the court thereupon imposed a fine upon him. Whether the court was authorized, under the circumstances, to impose the fine, was a matter which the law authorized and empowered the court to determine, just as in any other case of alleged contempt. While, for the purposes of the argument, it may be conceded that the court erred in reaching the conclusion it did, nevertheless its right and duty to pass upon the question was clear, beyond all question. If the judgment was erroneous, as is claimed, the remedy was the same as in the case of any other erroneous judgment where the right of appeal or writ of error is given. We regard the order directing the defendant to stand committed till the fine and costs were paid, in the nature of final process—a mere means enforcing the payment of the judgment—which would have been suspended by any order staying the judgment itself. If, as claimed, the judgment is erroneous, a writ of error was the appropriate remedy, and upon that hypothesis we must assume the reviewing tribunal would, if asked, have made the writ a supersedeas, which would have suspended the order of commitment till the case could be disposed of on the merits. The following authorities fully sustain the view here taken: *The People ex rel. v. Foster*, 104 Ill. 156; *The People ex rel. v. Pirfenbrink*, 96 Id. 68; *The People ex rel. v. Whitson*, 74 Id. 20; *Hammond v. The People*, 32 Id. 446.”

Plaintiff in error purged himself from contempt by his answer, if contempt there was (in reference to which we express no opinion), and should have been discharged. 4 Bl. Com. 287; *Welch v. The People*, 30 Ill. App. 399; *Buck v. Buck*, 60 Ill. 105; *Storey v. The People*, 79 Ill. 45.

On the hypothesis that any judgment could be rendered against plaintiff in error, the judgment entered is erroneous. The judgment is — “and he is hereby fined for such contempt the sum of two hundred and fifty dollars, which he is hereby ordered to pay immediately to the clerk of this court, and in default of which payment, he be imprisoned in the jail of this county and there held for the period of sixty days, and until discharged by due process of law, and a commitment issue to carry this judgment into effect.”

The judgment in such case, after the words "two hundred and fifty dollars," should be, that the defendant be committed to jail, there to remain until the fine and costs are fully paid, or he be discharged according to law, or words of like import. On such a judgment the prisoner would be entitled to be released from imprisonment on payment of the fine at any time after commitment, but on the judgment rendered, if committed on default of immediate payment to the clerk, he would have to remain in jail sixty days, even though willing to pay his fine the next day after commitment, and, in addition, would be liable for the amount of the fine.

The judgment will be reversed.

Emma Toles v. John Johnson et al.

1. **CHANCERY PLEADINGS—*Allegations of Fraud.***—Allegations of fraud, as conclusions of the pleader in chancery, are of no avail; there must be statements of acts or facts upon which such conclusions are based.

In Equity.—Bill for relief. Appeal from the Circuit Court of Cook County; the Hon. ELBRIDGE HANECY, Judge, presiding. Heard in this court at the October term, 1897. Affirmed. Opinion filed December 16, 1897.

GEORGE HUNT and JAMES R. WARD, attorneys for appellant.

GOLDZIER & RODGERS, attorneys for appellees.

Fraud is a conclusion of law; it is therefore incumbent on the party who would set it up to state the facts relied upon as constituting it. East St. Louis Conn. Ry. Co. v. People, 119 Ill. 182.

It is not sufficient, as it has been often held by this court, for the purpose of successfully assailing a transaction on the ground of fraud to charge fraud generally, but the com-

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plaining party must state in his pleadings and prove on the trial the specific acts or facts relied on as establishing fraud. Roth v. Roth, 104 Ill. 46.

MR. JUSTICE SEARS DELIVERED THE OPINION OF THE COURT.

This appeal is from a decree, which, upon sustaining a general demurrer to the bill of complaint, dismissed the same for want of equity.

The averments of the bill are substantially as follows:

That a judgment was entered by confession in the name of Jesse G. Wells, May 13, 1895, in the Circuit Court, against appellee John Alquist, upon three promissory notes, each of said notes made payable to the order of the State Bank of Chicago, and signed by appellees John Alquist and John Johnson. Each of said notes was indorsed as follows: "Without recourse, State Bank of Chicago." A warrant of attorney was attached to each note authorizing any attorney of any court of record to enter judgment by confession on the note in favor of the holder against the makers thereof.

On the day the judgment was entered, John Alquist was the owner in fee simple of lot 19, described in the bill.

It is averred in the bill that said judgment was caused to be entered by said Jesse G. Wells, by the procurement of said Johnson, against Alquist alone, with the intention of defrauding the said Alquist thereby, and for the purpose of enforcing the payment of said judgment out of the real estate aforesaid, and that Alquist had no knowledge of the existence of the judgment against him, and that Johnson, with the intention of defrauding Alquist and obtaining an undue advantage over him, obtained from the defendant, Wells, for the consideration of one dollar, an assignment of said judgment in the month of May, 1895.

That on June 23, 1895, John Alquist, by warranty deed, conveyed said real estate to Ludwig S. Bekken, and on July 31, 1895, Ludwig S. Bekken, by warranty deed, conveyed said real estate to appellant; that neither Alquist nor his grantees knew of the existence of the judgment, nor of the execution thereon, nor of the levy and sale of the real

estate until after the expiration of twelve months from the sale. That on October 31, 1895, Johnson procured an execution to be issued on said judgment, and levied upon said real estate, and at the sale thereof bid in the real estate for the amount of the judgment, and gave the sheriff a receipt in full satisfaction of the execution and costs; that the sheriff retained only \$13.78 for his costs and commissions, which sum was the total amount actually paid by the said Johnson for said certificate of purchase.

It is further averred in the bill, that Johnson fraudulently kept said proceedings, sale and purchase a secret from Alquist and complainant (appellant), and that the said proceedings and sale were a fraud upon the rights and equities of complainant. It is further charged in the bill, that Johnson knew on October 31, 1895, and before that date, that the complainant had purchased and become the owner of said premises.

The bill further avers that on January 11, 1897, J. J. Toles obtained a judgment against said John Alquist, and as a judgment creditor redeemed from said sale and paid to the sheriff the amount due; that the sheriff, upon receipt of said redemption money, proceeded in due form of law and sold the said real estate to J. J. Toles at public auction for the amount of the redemption money and the costs of sale, and in pursuance of the same, immediately after the sale, made a deed of the premises to said J. J. Toles.

The bill further averred that Ludwig S. Bakken and John Alquist, the grantors of appellant of the premises aforesaid, were each wholly insolvent, and that whatever judgment might be obtained against them, or either of them, could not be collected.

The bill was filed by appellant against the sheriff of Cook County, John Johnson, Jesse G. Wells and John Alquist, and the relief prayed was that the redemption money then in the hands of said sheriff might be treated as proceeds of the sale of said real estate, and declared a trust fund in the hands of said sheriff and subjected to the payment of the claim of appellant.

A temporary injunction was issued upon the filing of the bill, restraining the sheriff from paying over said money to John Johnson, and restraining said Johnson from assigning or otherwise disposing of the certificate of purchase issued to him by said sheriff, upon the making of the sale aforesaid. On May 3, 1897, upon argument of the general demurrers filed to the bill, the Circuit Court dissolved the temporary injunction and dismissed the bill.

It is contended that it appears from the averments of the bill and the necessary inferences therefrom, that the notes were obtained from the bank by John Johnson for the purpose of procuring a judgment to be entered upon them in the name of Wells, against John Alquist alone, with fraudulent intent, and that this amounted to a payment of the notes by Johnson, one of the payors, and therefore an extinguishment of the notes resulted.

To this we can not assent. If it was the purpose of the bill to show that Johnson, one of the makers of the notes, had paid them, and that the liability of Alquist upon the notes had thereby been extinguished, it was a simple matter to have alleged such *fact* of payment. After demurrer had been argued and sustained, appellant might still have taken leave to amend, and could then have alleged the fact which counsel now seek to have supplied by inference and argument. Argument and inference can not thus take the place of necessary positive allegation.

But it is argued that the transactions through which Johnson acquired the right to the redemption money, being fraudulent, therefore equity will impress upon the fund, *i. e.*, the redemption money, a trust in favor of appellant as *cestui que trust*. We are unable to see the force of this contention. The premise upon which the argument rests is wholly wanting. The bill contains no allegation of fact, which constitutes fraud. It is true that there is much statement of fraud as a conclusion of the pleader, but there is absence of any allegation of acts or facts to support such conclusion. Such statements of conclusion are of no avail. *Roth v. Roth*, 104 Ill. 46; *East St. Louis Conn. Ry. Co. v. People*, 119 Ill. 182.

The case of *Darst v. Thomas*, 87 Ill. 225, which is cited in support of the contention of appellant, is clearly distinguishable from the case here. If in this case the bill alleged that the debt secured by the notes in question was equitably the debt of Johnson and not equitably the debt of Alquist, then the contention of appellant might find support in the case cited. But the bill wholly fails in any such allegation. So far as the bill shows, the debt secured by the notes may have been, in equity, the debt of Alquist only. One seeking relief in equity must allege in distinct terms the facts necessary thereto.

The demurrer to the bill was properly sustained. Decree affirmed.

James H. Gilbert v. Forest City Furniture Co.

1. **QUESTIONS OF FACT—*Transaction a Sale or a Bailment.***—The question as to whether a transaction is a sale or merely a bailment is one of fact, for the determination of a jury on all the evidence.

2. **INSTRUCTIONS—*Abstract Propositions of Law.***—An instruction which states an abstract proposition of law without making any application of it to the facts of the case, is properly refused.

3. **SAME—*To Find for the Defendant, When Improper.***—A peremptory instruction to find for the defendant where there is a question of fact for the jury to decide on a conflict of evidence, is properly refused.

4. **SALES—*Of Personal Property—Change of Possession.***—To pass the title of personal property, there must be a change of possession so that third persons dealing with the vendee will not be deceived and defrauded by the appearance of ownership in one, while the title is really in another.

Replevin.—Appeal from the Superior Court of Cook County; the Hon. JONAS HUTCHINSON, Judge, presiding. Heard in this court at the October term, 1897. Reversed and remanded. Opinion filed December 16, 1897.

FLOWER, SMITH & MUSGRAVE, attorneys for appellant.

The policy of the law in this State does not encourage the owner of personal property to sell it and continue in

possession of it, possession being one of the strongest evidences of title to personal property. If the real ownership is suffered to be in one, and the apparent ownership in another, the latter gains credit as owner and is enabled to practice deceit on mankind. *Ketchum v. Watson*, 24 Ill. 591; *Lewis v. Swift*, 54 Ill. 436; *Lefever v. Mires*, 81 Ill. 456; *McCormick v. Hadden*, 37 Ill. 370; *Brundage v. Camp*, 21 Ill. 330; *Hervey v. Rhode Island Locomotive Works*, 93 U. S. 664.

ALLEN & BLAKE, attorneys for appellee, contended that the mere possession, without ownership, can not prevail as against the rights of the real owner, unless used as a cloak to cover up an actual sale, and the good faith of the appellee not being in question, it will be presumed in support of the verdict that the goods were left with Cronenberger simply for safe keeping, and not for the purpose of covering up a sale. *Rosencranz & Weber Co. v. Hanchett*, 30 Ill. App. 283; *McCullough v. Porter*, 4 Watts & S. (Penn.) 177; *Montague v. Ficklin*, 18 Ill. App. 99; *Hutchinson v. Oswald*, 17 Id. 28; *Fawcett, Isham & Co. v. Osborn, Adams & Co.*, 32 Ill. 422; *Klein v. Seibold*, 89 Ill. 540; *Burton v. Curyea*, 40 Ill. 329.

MR. JUSTICE WINDES DELIVERED THE OPINION OF THE COURT.

Appellee, which was a manufacturing corporation, doing business at Rockford, Illinois, in February and May, 1893, sold certain furniture, in question in this case, to one Cronenberger, a retail furniture dealer having his place of business in Chicago. The furniture was to be shipped at once, but there was delay both in the shipment and also in the delivery by the railway company of parts of it, which resulted in negotiations and correspondence between appellee and Cronenberger, both regarding the return of the furniture to appellee, and also its storage with said Cronenberger, and on which there is a conflict of evidence.

A large part of the furniture was received by Cronenberger as early as June, 1893, and exposed for sale in his place of business for some four or five months. There is

evidence tending to show that by reason of the failure of appellee to deliver some of the furniture according to the orders of said Cronenberger, that the sale to Cronenberger was, by agreement between him and appellee, rescinded, and the furniture stored with Cronenberger by appellee, until it could make other disposition of it, but under this alleged arrangement there was no visible change of possession, and the furniture, after this alleged arrangement, remained in Cronenberger's store, exposed for sale the same as his other stock in trade, for a space of some months. Appellee, also, after the time complaint was made by Cronenberger as to parts of the furniture not being delivered, in September, and as late as November 4, 1893, made attempts to collect from him the amount of its bill for the furniture and also endeavored to get his note in settlement of the account.

Under the contract of sale, it is not clear from the evidence, who was to pay the freight. Cronenberger, however, paid the freight as the goods were taken from the railway depot, but never got any credit for such payment from appellee. No request was ever made of Cronenberger by appellee that he return the goods.

Cronenberger, on November 13, 1893, being indebted to John V. Farwell Co. in an amount exceeding \$10,000, a judgment was on that day entered against him in favor of said Farwell Co., in the Circuit Court of Cook County, for \$10,725.85, on which execution was issued the same day, and a levy made by appellant as sheriff on said furniture, while in the possession of Cronenberger and exposed for sale in his store with his other goods.

Appellee brought replevin against appellant, after demand made. Appellant, among other pleas, pleaded property in Cronenberger, and justified under said execution. A trial resulted in a verdict finding appellant guilty, that the right of property was in appellee, and damages in its favor of one cent. On this verdict judgment was entered by the Superior Court, from which appellant appealed.

On behalf of appellee the trial court instructed the jury as follows:

Gilbert v. Forest City Furniture Co.

“If you believe, from the evidence, that at the time this suit was commenced and before, the defendant Gilbert was the sheriff of Cook County, Illinois, that he took possession of said goods by virtue of writ of fieri facias against the goods and chattels of one George J. Cronenberger, and that he was detaining possession thereof under said writ at the time of the commencement of this suit, and if you also find that the said Cronenberger was not entitled to possession of said goods as against plaintiff, then you are instructed that the right of defendant Gilbert was no greater than that of said Cronenberger, provided you believe further, from the evidence, that a demand was made by the plaintiff or its agent, before this suit was begun, on the defendant for the return of said goods.”

On behalf of appellant the court also gave the following instruction, to wit:

“The jury are further instructed that even though they should believe, from the evidence, that Cronenberger did not accept the goods, yet, if you believe from the evidence the plaintiff permitted the goods to remain in the store and stock of Cronenberger, with his other goods, without anything to indicate that they were not his property, and he was permitted to make sale of such of the property as he saw fit, then the plaintiff is estopped as against execution creditors from claiming that the title to the property never passed and the property did not belong to Cronenberger.”

The instruction for appellee does not state the law, under the evidence in this case, correctly, as it appears from the following cases: *Bastress v. Chickering*, 18 Ill. App. 208; *Murch v. Wright*, 46 Ill. 488; *Brundage v. Camp*, 21 Ill. 331; *Stadfeld v. Huntsman*, 92 Pa. St. 56; *Lapp v. Pinover*, 27 Ill. App. 171; *Ketchum v. Watson*, 24 Ill. 591; *Thompson v. Wilhite*, 81 Ill. 358; *Orr v. Gilbert*, 68 Ill. App. 429.

In the *Bastress* case, *supra*, the court said: “Where one party, by means of contract, and without notice to the world, suffers the real ownership in chattels to be in himself, and the ostensible ownership to be in another, the law will postpone the rights of the former to those of the exe-

cution or judgment creditors of the latter, because to injure third persons by giving a false credit to such ostensible owners, is the natural and probable result of the transaction."

In the Stadtfeld case, *supra*, the court said: "No doubt a sale and delivery of personal property, with an agreement that the ownership shall remain in the vendor until the purchase money is paid, enables creditors of the vendee to seize and sell it for the payment of his debts."

In the Lapp case, *supra*, where it appeared the plaintiffs, wholesale dealers in jewelry, sold and delivered to one Corinder, a retail dealer, certain jewelry, and afterward while it was in Corinder's possession, an arrangement was made between them by which Corinder was to hold the goods under consignment, and a memorandum to that effect was delivered to Corinder and entered upon plaintiff's books, after which possession of the jewelry remained unchanged, and Corinder pledged the jewelry as security for a loan made to him, and later sold it, with the remainder of his stock of goods, to defendants, creditors of Corinder, who, after redemption from the pledge, took possession of the jewelry, the court said: "The sale and delivery of the goods in question June 24, 1884, by the plaintiffs to Corinder, vested in the latter the title to the goods. And the re-sale of them back to plaintiffs July 22, 1884, by Corinder, being without any change of possession of the goods, would, if entirely formal in other respects, be void as to *bona fide* creditors, purchasers or pledgees, without notice."

In the Ketchum case, *supra*, the court said: "To pass the title as between (to) third persons, there must be a change of possession, so that others will not be deceived and defrauded by the appearance of ownership in one, while the title is really in another."

In the Orr case, *supra*, this court said: "If the real ownership is suffered to be in one, and the apparent ownership in another, the latter gains credit as owner, and is enabled to practice deceit on mankind."

It is claimed by appellee that there was no sale of the fur-

niture to Cronenberger; that the transaction was merely a bailment. That was a question of fact for the jury to determine on all the evidence—was really the point of controversy in the case.

The case of *Rosencranz v. Hanchett*, 30 Ill. App. 283, relied on by appellee as establishing that the transaction between appellee and Cronenberger was a mere bailment, recognizes the law to be as stated in the cases above noted. The court in that case says: "The only question is, therefore, whether the arrangement testified to by the witnesses Webber and Shute was fraudulent in law, as being a clothing of Shute with the ostensible ownership of the goods, while the company attempted to retain the real ownership in them. If it was such, then the title to the goods passed to Shute, so as to be liable to levy and sale under an execution against him."

The instruction for appellee ignores the rights of creditors who, as stated in the case last cited, would be entitled to levy their execution when the arrangement between the real owner and the debtor was fraudulent in law. Had this instruction told the jury what in law was a bailment and sale, and then left them to find from the evidence whether the arrangement between the parties, under all the evidence, was a bailment or sale, so far as third parties are concerned, and if the jury found that there was a bailment, then the conclusion of the instruction, that appellant's right was no greater than that of Cronenberger, would have been correct.

No cross-errors are assigned by appellee as to the second instruction given for appellant, but as his counsel have contended it was the law, we think it should be considered. If the jury believed from the evidence that Cronenberger never accepted the goods, then there was no sale; no title whatever passed to Cronenberger in the absence of fraud, even as to creditors or *bona fide* purchasers. *Rosencranz case, supra*, and cases there cited; *Hutchinson v. Oswald*, 17 Ill. App. 28; *Fawcett v. Osborn*, 32 Ill. 422; *Burton v. Curyea*, 40 Ill. 329; *Klein v. Seibold*, 89 Ill. 540.

If there was no sale in the first instance, a very different rule prevails from the rule which is to be applied if there was a sale and an attempted re-sale or rescission of agreement of sale. So long as the owner has not parted with his title, and has been guilty of no fraud in law he may reclaim his property. Such is clearly the law, as held by the cases last cited.

The facts stated in this instruction might well be applied to many cases of clear consignment, in which it is universally held the real owner may reclaim his goods as against an attaching or execution creditor of the consignee. This instruction should not have been given.

The instructions asked by appellant and refused by the court were properly refused. It would unnecessarily extend this opinion to quote them. The third ignores the evidence tending to show a rescission of the contract of sale between the parties. The fourth states an abstract proposition of law, without making any application of it to the facts of the case. The fifth is a peremptory instruction to find for defendant, and was improper because there was a question of fact for the jury to decide on a conflict of evidence, and besides, it was waived by asking instructions submitting the facts to the jury. The sixth was erroneous for the reasons stated with reference to the second instruction given on behalf of appellant. The seventh should not have been given, because the evidence fails to show who was to pay the freight. The eighth should not have been given, because the John V. Farwell Co. would have no right to levy its execution on the goods in question if it had notice of an agreement between appellee and Cronenberger that the goods were to be held by Cronenberger subject to appellee's order.

The judgment is reversed and the cause remanded.

Richard O'S. Burke v. Josephine E. Dunning.

1. **EXCEPTIONS**—*Absence of, etc.*—Where no exceptions are taken to the action of a trial court upon a motion, no complaint can be made of the action of the court upon such motion.

2. **ABSTRACT**—*Failure to Show Judgment, etc.*—When the abstract fails to show the judgment of the court below and contains no assignment of errors, it is sufficient to justify the Appellate Court in affirming the judgment.

3. **JUDGMENTS**—*A Judgment for Costs, is in Bar.*—A judgment against the plaintiff for costs before a justice of the peace, entered upon a verdict for the defendant, is final, and is a judgment in bar.

Transcript, from a justice of the peace. Error to the Circuit Court of Cook County; the Hon. CHARLES T. NEELY, Judge, presiding. Heard in this court at the October term, 1897. Affirmed. Opinion filed December 16, 1897.

M. B. GEARON and D. RYAN TWOMEY, attorneys for plaintiff in error.

The transcript of the justice shows the form of the pretended judgment as follows:

And upon verdict to the court, renders judgment in favor of the defendant against the plaintiff for costs of suit.

Plaintiff contended that this is a judgment for costs only, and a judgment for costs is not a final judgment. *Lee v. Yanaway*, 52 Ill. App. 23; *Frederick v. Connecticut River Savings Bank*, 106 Ill. 147; *Nichols v. Hail*, 5 Neb. 194; *Alton L. & C. Co. v. Calvey*, 41 Ill. App. 597.

A judgment for costs alone, though entered for the defendant, after the jury has found a verdict in his favor, is not final, and can not be made the subject of revision or appeal. *Freeman on Judgments* (8d Ed.), Sec. 16.

LOUIS E. HAET, attorney for defendant in error.

A judgment for costs against a plaintiff before a justice of the peace is a judgment in bar. *Zimmerman v. Zimmerman*, 15 Ill. 84.

Technical accuracy in transcripts of justices of the peace can not be required. *Payne v. Taylor et al.*, 34 Ill. App. 491.

The appearance of plaintiff in error in the Circuit Court and his proceeding to trial without objection bars plaintiff in error from questioning the jurisdiction of that court by reason of any preliminary proceedings. *Northrup v. Smothers*, 39 Ill. App. 588; *Randolph County v. Ralls*, 18 Ill. 29; *Phillips v. Hood*, 85 Ill. 450; *Birks v. Houston*, 63 Ill. 77.

MR. JUSTICE WINDES DELIVERED THE OPINION OF THE COURT.

Defendant in error sued plaintiff in error before a justice, where, on a jury trial, a verdict was rendered finding the issues for defendant, on which verdict the justice gave judgment in favor of defendant and against the plaintiff for costs. The plaintiff appealed to the Circuit Court, where, the defendant having entered his appearance on July 17, 1894, the case was called for trial on June 23, 1896, and a trial had, resulting in a judgment for plaintiff in the sum of \$200 and costs. At the July, 1896, term of said Circuit Court, defendant (plaintiff in error) entered a motion to set aside said last mentioned judgment, which motion was continued to the September, 1896, term, and again on May 5, 1897, entered another motion to vacate said judgment, which was overruled. It does not appear from the record that defendant was present either in person or by attorney at the rendition of the judgment of June 23, 1896, but he took no exception to the action of the court in overruling his motion to vacate the judgment, made May 5, 1897. No exception being taken, no complaint can be made of the court's action on this motion.

The abstract fails to show the judgment of the court, and contains no assignment of errors, which is sufficient to justify this court in affirming the judgment of the Circuit Court. *Gibler v. City of Mattoon*, 167 Ill. 22.

The record, however, is short, and we have thought proper to examine it. It shows the judgment of the court, as well as an assignment of errors, which is that it was error to render said judgment and overrule the motion of

Burke v. Dunning.

plaintiff in error to vacate the same. It is claimed that the judgment before the justice, being for costs only, was not a final judgment, from which an appeal would lie to the Circuit Court, and therefore that the Circuit Court had no jurisdiction.

In *Zimmerman v. Zimmerman*, 15 Ill. 84, it was held that a judgment by a justice against a plaintiff for costs, without stating in whose favor, was a judgment in bar—a final judgment.

The filing of the bond, transcript and appearance of plaintiff in error in the Circuit Court, gave that court jurisdiction of the parties. It had jurisdiction of the subject-matter, the suit being for failure to pay a certain demand not exceeding \$200. *Buettner v. Norton, etc., Co.*, 90 Ill. 415.

In *Titely v. Kaehler*, 9 Brad. 541, Judge Bailey said, speaking of the proceeding on appeal from a justice: "The appeal is merely a mode by which the parties and the matters in controversy between them are brought before the court; but the appeal being once perfected and the parties in court, their relations to the court and to each other are identical with those of parties to original actions."

The same judge, in *Reynolds v. DeGeer*, 13 Brad. 113, in speaking of the effect of an appeal, said: "The whole controversy was opened and the case was thenceforth in the same plight as though no trial had been had or judgment rendered upon any of the issues submitted to the justice." That being so, plaintiff in error is in no position to complain, even if no judgment whatever had been rendered by the justice.

In *Quinn v. People*, 146 Ill. 281, it was said by the Supreme Court, speaking of a defendant entering into a recognizance, "that a party can give jurisdiction of his person to a court having jurisdiction of the subject-matter, by consent, in cases civil or criminal, is so clear that it admits of no argument."

The judgment is affirmed.

E. T. Hitchcock v. City of Chicago.

1. **ORDINANCES.**—*Measure of Proof, in Prosecutions Under.*—In prosecuting for a penalty for the violation of a city ordinance, it must be shown that the person charged is clearly within the provisions of the ordinance.

Debt, for the violation of a city ordinance. Appeal from the Criminal Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in this court at the October term, 1897. Reversed and remanded. Opinion filed December 16, 1897.

GEORGE A. GARY, attorney for appellant.

The rule is universal that every ingredient of which the offense is composed, must be accurately and clearly expressed in the indictment or information, or the pleading will be held bad on demurrer. *U. S. v. Mann*, 95 U. S. 580; *U. S. v. Cook*, 17 Wall. 168; 1 Bishop Cr. Pro. (2d Ed.), Sec. 81; Archbold Cr. Pl. & Ev. (18th Ed.), 54.

And penal offenses created by statute must be accurately and clearly described in the pleadings for the recovery of the penalty. And if the offense can not be so described without expanding the allegations beyond the words of the statute, then the allegations must be expanded to that extent. *U. S. v. Mann*, 95 U. S. 580.

No essential element can be omitted without destroying the whole pleading. The omission can not be supplied by intendment or implication, and the charge must be made directly and not inferentially, or by way of recital. *U. S. v. Hess*, 124 U. S. 483; *People v. Fesler*, 145 Ill. 150; *Waddle v. Duncan*, 63 Ill. 223.

No appearance for appellee.

MR. JUSTICE SEARS DELIVERED THE OPINION OF THE COURT.

The following complaint was filed before a justice of the peace:

Affidavit and complaint of John C. Gardner, dated

Hitchcock v. City of Chicago.

December 18, 1896, says that "One E. T. Hitchcock, on or about December 17, 1896, did lease or rent a hall or building where a public entertainment was given, and permit the same to be used for the purpose of giving an entertainment therein for gain, without first obtaining from the mayor the license herein required, either in his own name or the person giving the entertainment, the said E. T. Hitchcock being the lessee or agent of said hall or building, within the jurisdiction of said city, in violation of section 920, Municipal Code, of an ordinance of said city, and contrary to the form of the ordinance in such case made and provided."

"That complainant has reasonable grounds to believe that said E. T. Hitchcock is guilty of such violation of said ordinance."

Warrant was issued by the justice of the peace, and upon trial defendant, plaintiff in error, was found guilty, and judgment was rendered in favor of the city against defendant. Upon appeal to the Criminal Court of Cook County trial was had, and upon verdict finding defendant guilty and assessing the fine, judgment was rendered. From this judgment the appeal is brought here.

The provision of this ordinance of the city of Chicago, upon which the prosecution was based, is as follows:

"Section 920. License—How taken out—Penalty.—It shall be the duty of every proprietor or lessee of any theater, hall or other building where public entertainments are given, before he permits any person or persons to use the same for the purpose of giving any entertainment therein for gain, to obtain from the mayor the license herein required, either in his own name or in the name of the person proposing to give such entertainment, under a penalty of \$50 for each and every violation of this section."

It appears from the evidence that plaintiff in error as agent, rented a public hall to the aid society of a church for a public entertainment, and that tickets of admission were sold for such entertainment.

The one question which is determinative of this appeal, is as to whether the verdict is supported by any evidence that

plaintiff in error was either proprietor or lessee of the hall here shown to have been used for a public entertainment. The only evidence bearing upon this question was the testimony given by Gardner, a police officer, a witness for the prosecution, and the testimony of plaintiff in error. Gardner testified, in substance, that he knew defendant; that defendant had charge, the last he knew, of a public hall at 55th and Halsted streets; that witness asked defendant if he had the renting of that hall, and defendant replied that he did; that defendant never told witness that he was proprietor or lessee of the hall, but did say that he had the renting of it. Defendant, plaintiff in error, testified that he was a druggist; that he had no connection with the hall, except that he rented it for Leander Choate, who was the proprietor, and that witness was neither the proprietor nor the lessee of the hall.

We do not regard this evidence as establishing a violation of the ordinance.

Bouvier defines a proprietor as an owner, and gives no other definition.

In proceeding for a penalty, it must be shown that the person to be charged is clearly within the provisions of the ordinance. *The City of Chicago v. Rumpff*, 45 Ill. 90.

The judgment is reversed and the cause remanded.

L. Hartman Co. v. Wagner Glass Co.

1. JURISDICTION—*Order Made Without*.—An order dismissing an appeal where the court is without jurisdiction is void.

Order, dismissing an appeal. Error to the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in this court at the October term, 1897. Reversed and remanded. Opinion filed December 16, 1897.

B. M. SHAFFNER, attorney for plaintiff in error.

Under the provisions of section 68 of the statute in relation to justices and constables, the appeal must be perfected by

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filing the papers and transcript of the judgment ten days before the commencement of a term of the Appellate Court, in order to have the cause stand for trial at such term. Unless the appeal is thus perfected ten days before the term, the cause must be continued over to the next succeeding term for trial. McMullen v. Graham, 6 Ill. App. 240; Schmidt v. Skelly, 10 Ill. App. 564; Sheridan v. Beardsley et al., 89 Ill. 477; Odd Fellows Benevolent Society v. Alt et al., 12 Ill. App. 570; Steinborn v. Thomas, 8 Ill. App. 515; Garrity v. Mallory, 53 Ill. App. 300; Camp v. Hogan, 73 Ill. 228; McVey v. Huott, 11 Ill. App. 203.

WM. A. DOYLE, attorney for defendant in error.

MR. JUSTICE SEARS DELIVERED THE OPINION OF THE COURT.

On June 5, 1896, an appeal bond was filed in the Superior Court, and a supersedeas issued by that court on an appeal by defendant (plaintiff in error) from a judgment of a justice of the peace.

No transcript of the judgment of the justice of the peace was filed in the Superior Court until July 13, 1897. No summons issued and no appearance of the appellee was entered prior to that date. Upon the last mentioned day a transcript was filed and appearance of appellee was entered. Upon the same day the appeal was dismissed by the Superior Court for want of prosecution, and a judgment rendered against the appellant (plaintiff in error) for costs.

The court was, at the time of entering the order, dismissing the appeal, without jurisdiction. Sheridan v. Beardsley, 89 Ill. 477.

The order was beyond doubt a matter of oversight, and would doubtless have been corrected had it been brought to the notice of the learned judge who entered it by a motion within the term—which would have been better practice than to wait till the expiration of the term to bring the writ of error.

The judgment must be reversed and the cause remanded.

72	200
93	1863

Augusta Willems v. Julius Willems.

1. **EQUITY PRACTICE—Bills of Review.**—A bill of review to review a decree on the ground of newly discovered evidence must specifically set forth the evidence and it must appear therefrom that it is evidence of an important and decisive character, and not merely cumulative. New evidence which simply tends to impeach the character or impair the credibility of witnesses, is not sufficient.

2. **SAME—Must be Filed by Leave of Court.**—A bill of review upon the ground of newly discovered evidence can not be filed without leave of court: although fraud in obtaining the decree is also charged and although leave is not necessary to the review of a decree for fraud alone.

3. **SAME—Bill in the Nature of a Bill of Review.**—A bill in the nature of a bill of review brought to impeach a decree for fraud must disclose the circumstances constituting the fraud.

4. **SAME—Insufficient Grounds—Bill of Review.**—Evidence to impeach witnesses examined upon the original hearing or for the purpose of showing subornation or perjury of such witnesses is not a sufficient ground for allowing a bill of review.

Bill to Set Aside a Decree for Divorce.—Error to the Circuit Court of Cook County; the Hon. ELBRIDGE HANEY, Judge, presiding. Heard in this court at the October term, 1897. Reversed and remanded. Opinion filed December 16, 1897.

ROSENTHAL, KURZ & HIRSCHL, attorneys for plaintiff in error.

No appearance for defendant in error.

MR. JUSTICE SEARS DELIVERED THE OPINION OF THE COURT.

Defendant in error, formerly the husband of plaintiff in error, filed his bill in chancery in the Circuit Court of Cook County, on February 2, 1897, by which he prayed that a decree of divorce entered against him in another cause in said court on May 8, 1896, in favor of plaintiff in error, then his wife, might "be set aside and held to be void." The bill was filed as an original bill, no leave to file having been asked or granted.

Three demurrers were sustained to this bill and its successive amendments. On April 21, 1897, defendant in error filed his last amended bill, to which plaintiff in error

demurred. The demurrer was overruled. Plaintiff in error elected to stand by demurrer. The bill was taken as confessed, and final decree was entered in accordance with the prayer of the bill. The only question presented upon this writ of error is the sufficiency of the bill upon demurrer.

The substantial allegations of the bill upon which the prayer for relief is based, are as follows:

“Your orator further represents and charges the fact to be that the said evidence of the said Augusta Willems and the said Alfred Pfiffner, adduced by them upon the said trial, to prove the charges of extreme and repeated cruelty against your orator, and the evidence upon which said decree was found, was false and perjured evidence, and manufactured by them for the purpose of procuring said decree, and that said decree is founded upon said false and perjured evidence only, but that your orator had, though using due diligence for the preparation of said trial, no means of making said fact known to this honorable court, at said time; but that since said time, and since the term of court at which said decree of divorce was rendered and entered, the means and witnesses by which said testimony can be shown to be false and perjured has come to the knowledge of your orator, and which he is ready and willing to produce upon the trial of this cause.”

The bill also alleges that when said witnesses, Augusta Willems and Alfred Pfiffner, testified upon the former trial, defendant in error also appeared and testified, denying the facts there testified to by said witnesses.

There are but two possible theories, suggested by the allegations, upon which this bill could be founded, viz., to impeach for fraud or to present newly-discovered evidence. For the latter purpose a bill of review, and for the former a bill in the nature of a bill of review, would lie if properly framed.

But if a bill of review be to review a decree on the ground of newly-discovered evidence, that evidence must be specifically set forth; and it must appear therefrom that it is evidence of an important and decisive character, and not

merely cumulative. *Griggs v. Gear*, 3 Gil. 10; *Gardner v. Emerson*, 40 Ill. 296; *Aholtz v. Durfee*, 122 Ill. 286.

New evidence which simply tends to impeach the character or impair the credibility of witnesses, is not sufficient. 2 Beach. Mod. Eq. Pr. 860.

And leave of court must be obtained to file such bill. 2 Daniell's Ch. Pl. & Pr. 1577; 2 Beach Mod. Eq. Pr. 866.

And a bill of review upon the ground of newly-discovered evidence can not be filed without leave of court, although fraud in obtaining the decree is also charged, and although leave is not necessary to the review of a decree for fraud alone. *Schaefer v. Wunderle*, 154 Ill. 577.

If a bill in the nature of a bill of review be brought to impeach a decree for fraud, the bill must disclose the circumstances constituting fraud. *Cooper's Eq. Pl.* 98; *Story's Eq. Pl.*, 8th Ed. 428.

Evidence to impeach witnesses examined upon the original hearing, or for the purpose of showing subornation of perjury of such witnesses, is not a sufficient ground for allowing a bill of review. *Southard v. Russell*, 16 How. (U. S.) 547; *Society of S. v. Watson*, 77 Fed. Rep. 514.

In the former case the bill charged that one of the solicitors for the complainant in the original suit, obtained by means of bribery, the testimony of a material witness in the cause, and upon the faith of whose evidence the court was induced to render its decision, and the court say: "Without expressing any opinion as to the influence this fact, if produced on the original hearing, might have had, it is sufficient to say that it does not come within any rule of chancery proceedings as laying the foundation for, much less as evidence in support of, a bill of review."

The bill here presented, when measured by these rules is found insufficient.

Upon the bare allegation that the witnesses named testified falsely the court is invited to again adjudicate upon precisely the same matter presented in the former trial, viz., whether the witnesses in question or the defendant in error told the truth as to the facts. No new matter or circum-

stance of fraud, other than what was there passed upon by the court, is disclosed.

Nor is there any specific showing of what newly-discovered evidence is to be presented.

From the allegations of the bill the only presumption which can arise is that such evidence would be corroborative of the testimony of defendant in error, *i. e.*, cumulative.

The fact that the bill is filed as an original bill, and without leave, does not operate to supply the elements which are lacking.

The demurrer to the bill should have been sustained.

The decree is reversed and the cause remanded.

William Lanahan & Son v. Fred L. Drew, Assignee.

1. VOLUNTARY ASSIGNMENTS.—*Power of Assignee to Estop Himself.*—An assignee, as such, is not estopped from claiming goods in his possession by reason of his having made statements that such goods did not belong to him, but were the property of a third person.
2. SAME.—*Construction of the Statute.*—Section 47, chapter 72, R. S., relating to voluntary assignments, must be construed as relating to the power of the assignee to make use of, handle and preserve the insolvent estate and make title thereto in case of a sale, and not that misconduct or verbal statements of the assignee should estop him to the injury of the creditors of the estate, in the same way that a private individual would be held to be estopped.

Voluntary Assignment. Appeal from the County Court of Cook County; the Hon. CHARLES H. DONNELLY, Judge, presiding. Heard in this court at the October term, 1897. Affirmed. Opinion filed December 16, 1897.

PARKER & PAIN, attorneys for appellants.

BULKLEY, GRAY & MORE, attorneys for appellee, contended that the property was in *custodia legis*, and that the sheriff had no right to levy upon it under executions issued from

another court. If the assignment was fraudulent, and on that account void, or if it was void for any other reason, or if the judgment creditors had a prior lien on the property, it was their duty, if they desired to contest it, to go before the County Court and ask for relief. *Wilson et al. v. Aaron*, 132 Ill. 238.

MR. JUSTICE WINDES DELIVERED THE OPINION OF THE COURT.

In December, 1896, one Eugene Jacquet made a voluntary assignment to appellee as assignee. Pursuant to an order of the County Court of Cook County, said appellee received bids in open court for the fixtures and a stock of wines and liquors belonging to the estate of said insolvent, and on January 13, 1897, the bid of John H. Minges, amounting to \$520, being the highest, was approved, and appellee was ordered by said County Court to execute a bill of sale of said property so sold to said Minges in consideration of the payment to appellee of said sum of \$520. The bill of sale was never delivered by appellee to said Minges, because he failed to pay or offer to pay his bid or any part of it.

There is evidence in the record tending to show that possession of said property was delivered to said Minges by said assignee, and also evidence tending to show that the bid was made in the interest of and for said insolvent, but on the other hand, there is evidence tending to show that the bid was in good faith and in the interest of the creditors of the insolvent, and also that said property was never delivered by appellee to said Minges. We think the preponderance of the evidence is that there was never a delivery to said Minges.

Appellee made a delay in making other disposition of said property, to enable said Minges to procure the money necessary to pay his bid, it being stated to appellee that said Minges expected to procure the money from a brother of said insolvent, who was coming from France, but not receiving the money, he sold a portion of said property at retail, and, as he claims, had realized by such sales more than \$520.

Lanahan & Son v. Drew.

February 25, 1897, appellants caused a levy to be made on part of said property so sold to Minges by the sheriff of Cook county, under an execution on a judgment in favor of appellants and against said Jacquet, but what the amount of said judgment was, or in what court rendered, does not appear, no proof thereof having been made so far as shown by this record.

March 5, 1897, upon a petition filed in said County Court by appellee, said court entered a temporary restraining order against appellants and the sheriff from selling said property. To this petition appellants filed their answer; a hearing was had before said County Court, resulting in an order entered March 12, 1897, permanently restraining appellants and said sheriff from selling or removing said property, and directing said sheriff to turn over the same to appellee. Appellants prayed and were allowed an appeal from the latter order.

As stated, the preponderance of the evidence being that said property was never delivered, and no part of said Minges' bid therefor having been paid or offered to be paid, the sale to said Minges, approved by said County Court, was never consummated, and no title whatever passed to said Minges, and it is immaterial that there was evidence tending to show that the bid was made in the interest of said insolvent. Even if said assignee had knowledge that the bid of Minges was not made in good faith, and that is not shown in this case, still the County Court under the evidence had the right to prevent the sale of said property by the sheriff, and preserve it for all the creditors of said insolvent. Appellants claim, however, that appellee's conduct and statements shown by evidence on the hearing before the County Court, estop him from now claiming that the title to said property had not passed from appellee, and complain of the refusal by the County Court of their seventh proposition of law, viz.: "Where the assignee has made statements to a deputy sheriff levying an execution on personal property, that the personal property did not belong to him, the said assignee, but was the property of a third

person, then the said assignee is estopped by said statements from claiming title to said property."

There is a preponderance of evidence that at the time of the levy appellee stated to the deputy sheriff that he made no claim to the goods on which the levy was made.

It is claimed that Sec. 47, Ch. 72, Rev. Stat., relating to voluntary assignments, gives the assignee the same power to deal with the assigned estate as the debtor had at the time of the assignment; but we are of opinion that this clause of the statute must be construed as relating to the power of the assignee to make use of, handle and preserve the insolvent estate, and make title thereto in case of sale thereof, and not that misconduct or verbal statements of the assignee should estop him to the injury of the creditors of the estate in the same way that a private person would be held to be estopped.

In the case of *National S. & L. Co. v. People*, 50 Ill. App. 336, this court held, in reference to contract between the appellant and insolvent, which provided that the title to a safe delivered to the insolvent should not pass until paid for in full, and in default of payment, appellant might take possession of and remove the safe without legal process, the safe having passed to the possession of the assignee, that appellant could not, without the order of the County Court, take the safe from the assignee, with or without process.

In *Hanchett v. Waterbury*, 115 Ill. 227, the Supreme Court said, speaking of the jurisdiction of the County Court of insolvent estates: "If, after the jurisdiction of the County Court has attached, third parties having real or pretended claims to or upon the trust estate, were permitted, by means of process issued out of other courts, to take possession of the property in the hands of the assignee, for purposes of litigation in such other courts, the County Court by this means might be deprived of its jurisdiction altogether." * * * "The assignee, the insolvent debtor, and all persons claiming an interest in or upon the fund, are subject alike to the summary jurisdiction of the court, and whatever rights, real or supposed, with respect

to the fund, must primarily be litigated therein," and held that a claimant of assigned property would not be allowed to replevy it from the assignee, but must present his claims to the County Court.

Appellants' counsel have referred us to *Camp v. Moseley*, 2 Fla. 171, as holding that an administrator would be estopped from afterward asserting title to property levied on by an officer, when he was present at the levy and did not object. We prefer rather to follow the course indicated by the Supreme Court of this State. We therefore are of opinion that the appellee should not be held to be estopped from claiming title to the goods in question, and that appellants should not have levied on the same, but should have presented their claims, if any, to the County Court, for adjudication. In any event, we can see no merit in the claim of appellants that they had a right to make said levy. Their judgment and execution was against Jacquet, and they claim that the goods in question were sold to Minges for Jacquet. No money was paid to the assignee, and he did not deliver possession of the goods to Minges or Jacquet. No title passed from the assignee, and therefore there was none in Jacquet on which the execution could be levied.

We think the seventh proposition of law was properly refused, that the finding of the County Court was justified by the evidence, and it is affirmed.

Chicago & N. W. Ry. Co. v. G. F. Gillison.

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173a	264

1. **MASTER AND SERVANT.**—*Inspection of Machinery.*—The proper and reasonable inspection of machinery furnished to the servant for use in his employment is a duty incumbent on the master, and while the master may perform this duty by another, and, if a corporation, must do so, the duty can not be delegated so as to exempt the master from liability for injuries occasioned by its omission or negligent performance.

2. **RAILROAD COMPANIES.**—*Duty to Inspect Machinery.*—It is the duty of a railroad company to inspect, from time to time, the appliances on its own cars; *a fortiori* it is its duty to inspect, before attaching to its

train, the appliances on the cars of another company, which it had not previously inspected, and the sufficiency or insufficiency of which it could only ascertain by such inspection.

8. EVIDENCE.—*Opinions of Witnesses, When Competent.*—When the facts are of such a character as to be incapable of being presented with their proper force to any one but the observer himself, so as to enable the triers to draw a correct or intelligent conclusion from them, without the aid of the judgment or opinion of the witness who had the benefit of personal observation, the witness is allowed, to a certain extent, to add his conclusion, judgment or opinion.

4. PERSONAL INJURIES.—*Proximate and Remote Causes.*—The question of proximate cause is not to be determined by minute niceties. A wrongdoer is at least responsible for all the injuries which result, as the natural consequences, from his misconduct—such consequences as might reasonably have been anticipated as likely to occur.

Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Heard in this court at the October term, 1897. Affirmed. Opinion filed December 16, 1897.

E. E. OSBORN, attorney for appellant; A. W. PULVER and LLOYD W. BOWERS, of counsel.

JAMES B. McCracken and ALBERT M. CROSS, attorneys for appellee.

MR. PRESIDING JUSTICE ADAMS DELIVERED THE OPINION OF THE COURT.

A freight train of the appellant, bound for Chicago, arrived at Rochelle, Illinois, on the evening of May 23, 1894. The crew of the train consisted of G. F. Gillison, the appellee, head brakeman; E. A. Mahlman, rear brakeman, and Hennings, conductor. The conductor, Hennings, ordered Mahlman to get out two empty cars which were standing on a side track north of the depot, which was called the "House Track." The empty cars stood on the house track, northwest from the depot, next east of the two empty cars on the house track, and northeast from the depot were two box cars, and east of the two box cars were two gondola cars filled with stone, the gondola cars being flat cars with low sides. There were two main tracks at

Rochelle, south of the depot, and the freight train was on the north main track headed east. North of the track on which the train was, and south of the depot, was another side track called the "main side track." At some distance east of the depot there was a switch connecting the house track with the main side track, and still further east was another switch connecting the main side track with the main track on which the train was. In order to take out the two empty cars, which stood furthest west on the house track, it was decided to pull seven box cars attached to the engine east and past the two switches above mentioned, then back west, through the switches, onto the house side track, couple the cars on that track as they were reached, pull all thirteen cars east through the switches and onto the main track, and then separate the two box cars and the two gondola cars taken from the house track from the empty cars wanted, in the usual way. Mahlman went ahead of the backing cars to couple the cars on the house track, and Gillison, while this was being done, stood on the car next to the engine, receiving signals from Mahlman and repeating them to the engineer.

When the coupling was complete, Mahlman climbed on the last car of the train, and Gillison, head brakeman, was on the car next the engine, when a signal was given to the engineer to go ahead, which he proceeded to do. When the engine reached the main side track switch, Gillison got off the car to throw the switch. The side track switch curved to the south, and Gillison got off the car a little west of the main side track switch, on the concave side of the curve, at a point where he supposed the engineer could see his signals, for the purpose of throwing the switch. He was then about between the two main tracks. While standing there he saw that the train had broken in two. He immediately called to Mahlman, who was then hanging on the south side of the third car from the rear (counting last car in train one), that the train had broken in two. He called several times before Mahlman understood him. As soon as he understood him, he, Mahlman, climbed on top of

the car, set one brake, and was proceeding to set another, when the cars collided. The house side track had a down grade toward the southeast. Gillison, while calling to Mahlman, also signaled the engineer, and then immediately climbed the ladder on the side of the box car next behind the gondola cars, which was the fourth car from the rear, set one brake and started for the other, when the front and rear sections of the train collided, and he was thrown from the car and his right leg was run over and crushed so as to necessitate amputation.

The evidence shows that the break occurred between the two gondola cars, which were laden with stone. The accident occurred about 10 o'clock P. M., and it was very dark. The train, at the time of the collision, was running from five to seven miles an hour. The witness, Mahlman, testified that the train broke in two between the two cars of stone; that the drawbar between those cars broke; that he examined it on the side track in about two hours after the accident, as nearly as he could fix the time; that it was broken right back of the head, close up to the car; that as nearly as he could describe the break, it seemed it was an old break; it was rusty; the upper half of the draft-iron was bright and the lower half, or about half, was rusty.

The witness describes the draft-iron as being six or seven inches square, not solid, but hollow, and says that he does not know the thickness of the metal around the hollow part.

Mahlman, testifying on direct examination as to what he did after coupling the two gondola cars to the seven cars attached to the engine, and which were backed up on the side track, says: "Then I walked back to see whether the coupling was made between the two cars of stone, and everything looked all right, and I walked further on. I looked for bad order marks, but I could not find any. I will say I did not look very close, but as a rule you can find them outside of the car. I did not see any." On cross-examination he testified: "I examined the coupling between the two stone cars and found it all right. I just looked to see whether they were coupled, and to see whether everything was all

right. I just went in and held up my lamp close to the draft-irons and looked to see if everything was all right. I went between the cars where there was room for me to step in; I held my lamp up to the draft-irons, and everything appeared to be all right." The evidence as to what signals were given and what received by the engineer is substantially as follows: Mahlman and Gillison both testified that, when the cars were all coupled on the side track, a signal was given to the engineer to go ahead. Gillison says Mahlman gave the signal to him and he to the engineer. Mahlman testifies that, afterward, and when Gillison "hollered" to him that the train was broken in two, he saw Gillison give the go-ahead signal to the engineer with his lantern. Gillison testifies that, at that time, he gave two signals to the engineer—the go-ahead signal and the break-in-two signal—but Mahlman says he did not see the latter, but only the former signal.

Van Black, the engineer, called by the appellant, testified: "I received signals just prior to the time that Gillison was hurt. I was pulling the train out on the main track; my engine was out on the main track, beyond the main side track switch, going east; I was on the right hand side of the engine, or the south side; my head was out of the window; I was looking west, looking back for a signal; I got signals made with a lantern; the man that gave me the signals was standing between the two main tracks, between the south and the north main; I should judge he was just about opposite the main side track switch. He gave me a stop and back-up signal; a signal across the track and then a signal to back up. At the time I got that signal my train was running probably five or six miles an hour. I did not get any other signal than that I describe. Upon receipt of that signal I stopped and started to back up; I applied the air, and the engine came to a full stop, and I started to back up. The engine had just started to move when I felt the rear—felt the cars run into the forward portion of the train, but I had not moved possibly over a foot."

The plaintiff's right leg was amputated twice, the first

time at the Delos Hotel in Rochelle, where he was confined for six weeks; the second time at St. Luke's Hospital in Chicago; the last amputation being about four and one-half inches below the hip. He had been earning as brakeman \$60 per month. Since the injury he has not been able to work as a brakeman. The jury found the defendant guilty and assessed damages at the sum of \$18,000; a remittitur was entered of \$8,000 and judgment was rendered accordingly, to reverse which this appeal was taken.

Appellant's counsel contend, first, that there is a variance between the declaration and the evidence, in that the declaration avers that the coupling apparatus broke when subjected to the strain incident to the starting of the train, whereas the evidence is that it did not break until after the train started. We do not think this a material variance. The material part of the allegation is that the coupling broke, and whether it broke at the instant of starting or subsequently, and by reason of the strain to which it was subjected on starting, and the continued strain resulting from the car being drawn along, is immaterial.

Counsel further contend that the evidence fails to establish that appellant knew of the defective condition of the drawbar, or that by the exercise of ordinary care it might have known of it.

The evidence shows that Mahlman, appellant's brakeman, discovered the defect about 12 o'clock in a dark night by the light of a lantern; that he found that the lower half of the break in the drawbar was rusty and seemed to be an old break, and that the upper half of it was bright. We are of opinion that this was evidence from which the jury might reasonably infer that appellant, in the exercise of ordinary and reasonable care, might and could have discovered the defect.

In *Spicer v. South Boston Iron Co.*, 138 Mass. 426, cited with approval in *Sack v. Dolese et al.*, 137 Ill. 135, James W. Harvy, a witness for plaintiff, testified that he had seen and examined the hook in question, and had discovered a crack or flaw about half an inch above the flaw, at the place

of the rupture which caused the accident. The hook in question was an S hook, and was used to sustain heavy weights. The court say: "The fact that there was actually a visible crack or flaw in the hook above the flaw at the place of rupture, and that, as testified to, iron will usually break in the weakest spot, taken together, tended to show that a careful inspection would have revealed the weakness of the hook."

In *Union Pac. Ry. Co. v. Daniels*, 152 U. S. 684, which was an action for injuries occasioned by a defective wheel, the court say: "The evidence tended to show that Daniels was a brakeman in the employment of the company, and in the discharge of his duties as such, April 3, 1887, on a freight train made up at Green River, and running thence westward, that he was ordered on top of the train to set the brakes at different points going down a long hill, and was so engaged when the train was suddenly wrecked, and he was severely injured; that a wheel on one of the cars of the train had an old crack in it, some twelve inches long, which rendered it unsafe; that the wheel gave way by reason of the fracture and thus the disaster occurred; and that, although the crack, being old, was filled with greasy dirt and rust, it could have been detected without difficulty if the wheel had been properly examined at Green River, which was an inspecting station, at which trains were made up.

Upon the inferences properly deducible from such evidence, the rule applied, which requires of the master the exercise of reasonable care in furnishing suitable machinery and appliances for carrying on the business for which he employs the servant, and in keeping such machinery and appliances in repair, including the duty of making inspections, tests and examinations at the proper intervals. As observed in *Hough v. Railway Co.*, 100 U. S. 218, the duty of a railroad company in that respect to its employes is discharged when, but only when, its agents, whose business it is to supply such instrumentalities, exercise due care as well in their purchase originally, as in keeping and maintaining them in such condition as to be reasonably and adequately

safe for use by employes; and the company 'can not in respect of such matters interpose between it and the servant, who has been injured, without fault on his part, the personal responsibility of an agent who, in exercising the master's authority, has violated the duty he owes, as well to the servant as to the corporation.'"

In *Seese v. Nor. Pac. Ry. Co.*, 39 Fed. Rep. 487, in Circuit Court, Dist. Minnesota, which was an action by a brakeman to recover damages for an injury to his hand while coupling cars, there was evidence tending to show that the bolts which went into the dead-wood were sunk into the timber, and let the draw-head down four inches too low; that the defect was not recent, but old, and that the plaintiff did not know of it. Held, that it was a proper case to go to the jury on the evidence. There was a defect in the rod of a brake, which the court, in its opinion, describes as "an ancient flaw or crack extending obliquely about two-thirds into its body." The plaintiff, a brakeman, was injured by falling from a freight car, by reason of the breaking of the rod while he was operating it. The jury found specially that neither the plaintiff nor defendant had knowledge of the defect, but the court held that the plaintiff was entitled to recover, saying: "In the present case all the conditions exist upon which the defendant's responsibility depends, and none by which it can be removed. The plaintiff had no knowledge nor information nor opportunity for examination of the defective rod, and the hazard of its continued use, and was performing his duty when it parted under the strain, and he fell. Had the proper examination been made by the defendant, and the rod repaired and strengthened, the accident would not have occurred, and hence it must be ascribed to the defendant's own dereliction of duty." *Johnson v. Richmond & D. R. R. Co.*, 81 N. C. 453; see also *Mobile & O. R. R. Co. v. Harmes*, 52 Ill. App. 649; *Warden v. Old Colony R. R.*, 137 Mass. 204.

Ignorance of defects in instrumentalities used by the servant is no defense as to the master. *Benzing v. Steinway et al.*, 101 N. Y. 547.

In *Bailey v. Rome, W. & O. R. R. Co.*, 49 Hun, 377, the court in its opinion states the evidence thus :

“The evidence shows that the plaintiff was employed as a brakeman on a freight train of the defendant, running from Norwood to Rome. On the day of the accident, after the train had been made up at Norwood ready to start, five flat cars loaded with railroad iron were placed in the train next to the engine, and the train, consisting of thirty cars, then proceeded to DeKalb Junction. The train having then stopped at that station, was started again with a view of placing it on a side track, moving upon a down grade. The plaintiff in the performance of his duty attempted to set the brake on the fourth flat car from the engine, and swayed upon the wheel in the usual manner, when the brake rod came out and he was thrown from the car and injured by the moving train. On examination after the injury it was found that the pin in the bottom of the brake rod, designed to hold the rod in place, was gone. There is no evidence how long this defective condition of the brake had existed. The plaintiff testified that the rod came out easily when he swayed upon it. The absence of the pin could not have been seen by one working the brake, but an inspection of the brake from under the car would have disclosed its absence.”

The trial court took the case from the jury and gave judgment for the defendant. But the Court of Appeals reversed the judgment, saying: “In this case the company had provided for a proper inspection, which, if it had been made would have led to the discovery of the defective condition of the brake at Norwood, assuming that the pin was not in the rod when the train started from that place. The rule required an inspection at that point, and if due inspection was omitted there, and the injury resulted from a defect then existing, a case was made for the jury, because the master is never exonerated by the negligent omission of a subordinate to perform duties which are imposed upon him in his character as master, resulting in injury to other employees. We think there was enough shown from

which the jury might infer that the pin was not in the rod when the train left Norwood, and that the failure to discover the defect there, was in consequence of the omission to properly inspect the car at that point."

Counsel for appellant seem to lay stress on the examination made by Mahlman when coupling the cars prior to the accident. It is evident from the testimony of Mahlman, which has been substantially quoted, that his examination was mainly for the purpose of ascertaining that the gondola cars were properly coupled, and not at all for the purpose of determining whether the couplings were sound and in good condition, and that his examination or cursory inspection was not at all equivalent to a careful inspection such as the law requires.

The proper and reasonable inspection of instruments or machinery furnished to the servant for use in his employment is a duty incumbent on the master, and while the master may perform this duty by another, and, if a corporation, must so do, the duty can not be so delegated as to exempt the master from liability for injuries occasioned by its omission or negligent performance. 2 Bailey's Pers. Inj., etc., Sec. 2618; Un. Pac. Ry. Co. v. Daniels, 152 U. S. 689.

In *Sack v. Dolese et al.*, *supra*, the court, commenting on the duty of inspection, say: "In the operation of cars a most efficient and, perhaps, a necessary method of discharging that duty, is to maintain a careful system of inspection, to see that the necessary appliances in use thereon are in good order and sufficient to answer the purposes for which they are intended." In the present case there is no evidence that there was any inspection whatever, the cursory and superficial examination of Mahlman, while coupling the cars, not being worthy the name of inspection.

Appellant's counsel object that the evidence is insufficient to support the averment that the draft-iron broke by reason of the strain incident to starting, and that the more reasonable conclusion from the evidence is, that it was broken by the force of the collision. We are of opinion that the evidence was sufficient to warrant the jury in finding that the draft-iron broke from the former cause.

The objection that there is no evidence that the gondola cars were appellant's cars, if at all material, is untenable. The evidence is that the gondola cars were on the appellant's side track, and therefore in its possession, which, in the absence of evidence to the contrary, was sufficient proof of the ownership of appellant. But the question is immaterial, because whether the cars belonged to appellant or to another railway company, the duty of inspection was the same. *Buswell on Pers. Inj.*, Sec. 197; *Sack v. Dolese et al.*, 137 Ill. 129; *Mobile & O. R. R. Co. v. Harmes*, 52 Ill. App. 649.

This rule is eminently just. If it is the duty of a railroad company to inspect, from time to time, the appliances on its own cars, *a fortiori*, it is its duty to inspect, before attaching it to its train, the appliances on the car of another company, which it had not previously inspected, and the sufficiency or insufficiency of which it could only ascertain by inspection.

The evidence shows that the car, the draw bar of which broke, was in a different place on the side track from where it was when the collision occurred, when, about two hours after the collision, Mahlman examined the draw bar, and appellant's counsel object that an examination two hours after the collision, and in view of the difference of location of the car, is not sufficient to sustain the averment that the draft-iron broke, as averred in the declaration. In support of this proposition, appellant's counsel cite the following cases: In *Perry v. Mich. C. R. R. Co.*, 65 N. W. Rep. 608, the complaint was of improper inspection and the putting into the train a car having defective draft-irons, and the court say: "There was no evidence whatever that the car was defective at the time it was put on the train. On the other hand, the testimony of the defendant shows that it was in good condition at that time."

The defendant's car inspector testified that he inspected the car the morning of the day the plaintiff was injured, and found it in good condition, and nothing out of order.

In *Penna. Co. v. Marion*, 27 Am. & Eng. R'd Cases, 132, it was held that evidence of the condition of a platform

in March was not admissible evidence of its condition in December of the next preceding year, in the absence of evidence that in both those months the condition was substantially the same.

In *Little Rock & Ft. Smith R. R. Co. v. Eubanks*, 31 Am. & Eng. R'd Cases, 176, which was an action for injury occasioned by a defective track, certain witnesses testified to the condition of the track the morning after the accident. The court say: "When a defective track is alleged to be the cause of the casualty, it is often impracticable to adduce evidence of the condition of the track at the precise moment the casualty occurred. It is enough to prove such a state of facts, shortly before or after, as will induce a reasonable presumption that the condition is unchanged."

In *Stoher v. St. L., I. M. & S. R. R. Co.*, Ib. 229, the plaintiff was injured by the embankment on which the track was constructed giving way. The accident occurred May 9, 1880. It was held that evidence of the condition of the track in the spring of 1883 was inadmissible, but the court say: "It will, we think, ordinarily be sufficient to show the state of facts tending to show negligence in the construction and maintenance of the railroad, at the time, or recently before or after, and within such reasonable time as will, from the nature and circumstances of the case, induce or justify a reasonable presumption or inference that the condition is the same." Ib. 233-4.

Neither the foregoing cases nor others cited by appellant's counsel support their contention; on the contrary, the last two cases quoted are diametrically opposed to it.

The testimony of the witness, Mahlman, as to the condition of the draw bar, was clearly competent. *City of Bloomington v. Osterle*, 139 Ill. 120; *Chicago, P. & St. L. Ry. Co. v. Lewis*, 145 Ill. 67.

Objection was made on the trial to the testimony of Mahlman that the brake was rusty and seemed to be an old one, and while the assignments of error are, perhaps, sufficiently comprehensive to include the objection, appellant's counsel have not noticed it in their argument, and may,

therefore, be presumed to have abandoned it. It was not within the power of appellee to produce the draft-iron on the trial, and it was not produced by appellant, therefore, the testimony of Mahlman, who examined it, as to how it appeared, was competent.

“When the facts are of such a character as to be incapable of being presented with their proper force to any one but the observer himself, so as to enable the triers to draw a correct or intelligent conclusion from them, without the aid of the judgment or opinion of the witness who had the benefit of personal observation, he is allowed, to a certain extent, to add his conclusion, judgment or opinion.” *Bates v. Town of Sharon*, 45 Vt. 474; *Atchison, T. & S. F. R. R. Co. v. Miller*, 39 Kan. 419; *Yahn v. City of Ottumwa*, 60 Ia. 429; 2 *Jones on Law of Ev.*, Sec. 362; 1 *Wharton on Law of Ev.*, 2d Ed., Sec. 511, and cases cited; *Brennan v. People*, 15 Ill. 511.

Counsel for appellant further contend that the proximate cause of the injury was the collision, and not the breaking of the draft-iron, and that the risk of the collision was a risk assumed by the appellee.

The question of proximate cause is not to be determined by minute niceties. For instance, it might be said of a shot fired by A, which killed B, that the proximate cause of the killing was not the pulling of the trigger, thus causing an explosion and the forcible ejection of the bullet, but the impact of the bullet on the person of B, and its penetration of his person. The latter must certainly be deemed to have been the ultimate or final cause, yet it could not be held that the firing of the shot was not, in law, the proximate cause of B's death.

Counsel contend that there was a sufficient cause intervening between the breaking in twain of the train and the collision between the two sections of it, to account for the collision, viz., the stoppage of the forward section of the train by the engineer. We are of opinion that the evidence, to say the least, tends to show that the engineer stopped the forward section after the breaking in two of the train,

and the question is whether, if the engineer so did, it would defeat appellee's action.

Ransier v. Minneapolis & St. L. Ry. Co., 32 Minn. 331, was an action for injury alleged to have been occasioned by a defective brake, and in that case, as in the present, it was claimed that the collision resulting in injury to the plaintiff was immediately caused by the stoppage of the forward section of the train by the engineer, and therefore the defective brake could not be regarded as the proximate cause. In respect to this objection the court say: "According to the unopposed testimony of the brakeman, whose competency is not questioned, it may be considered that the coupling would not have broken except for the sudden release of the defective brake. The breaking apart seeming to have been a natural result—a result likely to occur from the use of the defective brake in the ordinary operation of the train—is legally referable to the defect complained of as its proximate cause, and the other concurring influence does not affect the responsibility of the defendant. *Griggs v. Fleckenstein*, 14 Minn. 81; *Johnson v. Chicago, M. & St. P. Ry. Co.*, 29 Minn. 425; *McMahon v. Davidson*, 12 Minn. 357; *Campbell v. City of Stillwater*, 32 Minn. 308.

The subsequent collision is further removed from that cause in the order of events, but is it so in its causal relation? The answer, upon principles recognized as being within the scope of the maxim *causa proxima non remota spectatur*, is not difficult. The principle is well settled that a wrongdoer is, at least, responsible for all the injuries which resulted as natural consequences from his misconduct—such consequences as might reasonably have been anticipated as likely to occur. *Griggs v. Fleckenstein, supra*; *Nelson v. Chicago, M. & St. P. Ry. Co.*, 30 Minn. 74; *Johnson v. Chicago, M. & St. P. Ry. Co., supra*; *Martin v. North Star Iron Works*, 31 Minn. 407; *Savage v. Chicago, M. & St. P. Ry. Co., Id.* 419; *Milwaukee & St. P. Ry. Co. v. Kellogg*, 94 U. S. 469; *Lane v. Atlantic Works*, 111 Mass. 136; *Hill v. Winsor*, 118 Mass. 251; *Fairbanks v.*

Kerr, 70 Pa. St. 86; Sheridan v. Brooklyn City, etc., R. Co., 36 N. Y. 39; Lake v. Milliken, 62 Me. 240; Weick v. Lander, 75 Ill. 93. And whether the injury in a particular case was such natural and proximate result of the wrong complained of, is, ordinarily, for the determination of a jury. See cases above cited."

Weick v. Lander, 75 Ill. 93, cited *supra*, fully sustains the doctrine announced by the Minnesota court. The doctrine there announced is in accord with the holding in Scott v. Shepard, 2 Sir Wm. Bl. 342. In that case, while the judges differed as to whether the action should be trespass or case, they were unanimous in holding that Shepard, who first threw the squib, was liable to the plaintiff for the ultimate consequence, notwithstanding that new directions were subsequently given to it by third persons, upon the ground that the original throwing was unlawful.

What was the proximate cause, was a question for the jury. Ransier v. Ry. Co., *supra*; Pullman Pal. Car Co. v. Laack, 143 Ill. 242, 259; Distler v. Long Island R. Co. (N. Y.), 45 N. E. Rep. 937; 2 Bailey's L. of Pers. Inj., etc., Secs. 1028, 1033, 1042.

It is clear that the train would not have broken had it not been for the defective draft-iron, and therefore the utmost that appellant can claim is, that the breaking of that iron and the stoppage of the forward section of the train by the engineer, combined to produce the collision. But this can not avail appellant as a defense.

In Pullman Pal. Car Co. v. Laack, *supra*, the court say: "It is well settled that when the injury is the result of the negligence of the defendant and that of a third person, the plaintiff may recover, if the negligence of the defendant was an efficient cause of the injury," and in the same case the court say: "If, therefore, the wrong of the appellant put in motion the destructive agency, and the result is directly attributable thereto, and there was no intervention of a new force or power of itself sufficient to stand as the cause of the mischief, the negligence of appellant must be considered the proximate cause of the injury."

Eliminating from the case the defective draft-iron and the breaking of it by reason of its defective condition, it can not reasonably be said that the stoppage of the train by the engineer was the intervention of a new force of itself sufficient to stand as the cause of the mischief.

In *Warden v. Old Col. R. R. Co.*, 137 Mass. 204, the court say: "It was the duty of the defendant to provide suitable means for keeping the rope in a safe condition, and neglect of that duty would be the direct negligence of the defendant, for which it would be liable, even if the negligence of a fellow-servant contributed to the injury." *Union Pac. Ry. Co. v. Callaghan*, 56 Fed. Rep. 938, and cases cited.

This is an instructive case on the question of proximate cause. The court say: "In considering these questions, it must always be borne in mind that the proximate cause is not always nor generally the act or omission nearest in time or place to the effect it produces."

Counsel asserts that the risk of a collision between the rear and forward section of the train was assumed by appellee. It is not claimed by counsel that appellee was negligent in getting upon a car of the train, after the train broke in two, for the purpose of preventing a collision, if possible. On the contrary, counsel for appellant admit that it was appellee's duty so to do. The contention of counsel is based on the legal proposition that when appellee entered in the employment of brakeman for appellant, he assumed the ordinary risks or hazards of that employment. As an abstract legal proposition, this is correct, but it has no application to the facts of the present case. The omission by appellant of a duty incumbent on it by law, was not a risk assumed by appellee.

In *Pullman Pal. Car Co. v. Laack*, *supra*, the court say: "As a general rule, the servant assumes the natural and ordinary risks of the business in which he engages, and is held to impliedly contract that the master shall not be liable for injuries consequent upon the negligence of a fellow-servant, in the employment of whom the master has exercised proper care, but he does not assume or contract

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to waive liability of the master for his own negligence, whether committed in person or by an agent authorized by the master to perform a duty resting upon him. In such case, the master being under contract duly to perform, the servant may, without sufficient appearing or being shown to put him upon notice to the contrary, rely upon the due and reasonable performance of the duty. The law will not permit the master to evade the duty which it has cast upon him, by shifting it upon another." What is here said is amply sustained by authority.

October 8, 1896, appellee, by leave of court, filed an additional count to his declaration, to which appellant pleaded the statute of limitations, claiming that a new cause of action was stated in the additional count, to which plea the appellee demurred, and the demurrer was sustained by the court. This is assigned as error. Appellant filed a written motion for a new trial in the trial court, in which were specified the grounds of the motion, but the sustaining the demurrer was not specified as a ground of the motion; it must therefore be held to have been waived, and can not be considered on this appeal. *Stuve v. McCord*, 52 Ill. App. 331; *Ottawa, O. & F. R. V. R. R. Co. v. McMath*, 91 Ill. 104.

Finally, appellant objects that the judgment is excessive. We would not feel warranted in disturbing the judgment on that ground.

Appellant's counsel do not, in their brief, complain that there was any error in the giving or refusing instructions.

The judgment will be affirmed.

Wm. J. Lemp Brewing Co. v. Ellen Lonergan and James O'Donnell.

1. **LANDLORD AND TENANT—Termination of Leases.**—Section 9 of the statute in relation to forcible entry and detainer, providing that it shall not be necessary in case of default in any of the terms of a lease, to give more than ten days notice to quit, or of the termination of the tenancy, does not exclude the termination of a tenancy by the five days notice provided for in section eight of the same act.

Forcible Entry and Detainer.—Appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in this court at the October term, 1897. Affirmed. Opinion filed December 16, 1897.

HOYNE, FOLLANSBEE & O'CONNOR, attorneys for appellant.

J. HENRY KRAFT, attorney for appellees.

MR. JUSTICE WINDES DELIVERED THE OPINION OF THE COURT.

Appellant, under the terms of a lease between it and appellees, entered judgment by confession in the Circuit Court for \$489, balance alleged to be due for rent of premises described therein, being the basement of building numbered 87 and 89 Clark street, Chicago, for the months of April, May and June, 1896. On motion of defendants, this judgment was vacated, and leave given to defendants to plead. The issues were made, and a trial had before the court and a jury, resulting in a verdict and judgment for defendants, from which this appeal is prosecuted.

On the trial appellant offered in evidence said lease, which, by its terms, provided for payment of rent of said premises, at the rate of \$210 per month, and, among other things, provided that "at the termination of this lease, by lapse of time or otherwise, second party shall yield up immediate possession to said party of the first part, and failing so to do, shall pay as liquidated damages, for the whole time such possession is withheld, the sum of ten dollars per day."

The agent of appellant, Mitchell D. Follansbee, testified that rent for the months of April, May and June, 1896, was unpaid, except the sum of \$161, leaving a balance due of \$469 to appellant; that said sum of \$161 was paid by appellee O'Donnell, April 24, 1896; that the keys of the leased premises were left on his desk by O'Donnell and his attorney April 23d; that he declined to accept the keys, and told them they could leave them wherever they wished on their own responsibility; that he, as agent, would hold O'Donnell on the lease for its entire term; that he would

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exercise no supervision over the premises, and should do nothing with the keys. On cross-examination this witness said he was told Mr. Lonergan had moved out of the premises, and took all the stock with him; that he, as the agent of appellant, served on defendants a notice, of which the following is a copy, viz.:

TO ELLEN A. LONERGAN AND JAMES O'DONNELL:

You are hereby notified that there is now due us the sum of \$210 and no cents, being rent for the premises situated in the city of Chicago, in Cook county, in the State of Illinois, and known and described as follows, viz.: The basement of the building known as the Grand Opera House building, and numbered eighty-seven and eighty-nine Clark Street, Chicago, Illinois.

And you are further notified that payment of said sum so due has been demanded of you, and that unless payment thereof is made on or before the 23d day of April, A. D. 1896, your lease of said premises will be terminated. Hoyne, Follansbee & O'Connor is hereby authorized to receive said rent so due for me.

Dated this 17th day of April, A. D. 1896.

THE WM. J. LEMP BREWING COMPANY,
Landlord.

BY HOYNE, FOLLANSBEE & O'CONNOR,
Its Attorneys and Agents.

Appellees offered in evidence also the following letter received by appellee O'Donnell from the writers:

April 21, 1896.

MR. JAMES O'DONNELL,
Michigan Street, Near Dearborn Ave.,
Chicago.

DEAR SIR: Lonergan refusing to pay his rent, we are going to close him up to-morrow, and also enter a judgment on the lease against you. From present appearances, he is not going to do any better now than he has been doing before, and the sooner we find out where we stand the better.

If you will pay the rent before to-morrow at ten o'clock,

we will not enter up judgment and make costs; otherwise we most certainly shall.

Yours very truly,

HOYNE, FOLLANSBEE & O'CONNOR,

By Mitchell D. Follansbee.

Appellee O'Donnell also testified that said agent of appellant took the keys of the premises at the time they were offered to him, and said agent at that time stated there was \$161 due for rent. This witness also testified that Mr. Lonergan moved out April 23, 1896.

John M. Lonergan testified that he acted as agent for his wife, and that he received the notice of April 17, 1896, on that day, at his place of business, at that time 87 and 89 Clark street, and kept it until April 23, 1896, when the keys were left with the agent of appellant, and that he was present when the keys were left with said agent.

The court, among other instructions for appellant, instructed the jury fully as to what was necessary in order to terminate a tenancy. And with other instructions for appellees gave the following:

"The jury are instructed that the plaintiff herein had the right to terminate the tenancy, and if from the evidence you believe that by reason of a notice served upon the defendants, or otherwise, the plaintiff did terminate the tenancy, then, if you further find that the defendants did pay rent up to the time of the termination of such tenancy, and did surrender up the premises, your verdict should be for the defendants."

Appellant claims this instruction and others of a similar nature given on behalf of appellees, were erroneous because they leave the jury to determine a mixed question of law and fact, to wit, whether or not the lease was terminated. But in this we think there could be no reversible error. As has been seen, the jury were fully instructed on behalf of appellant as to what was necessary in order to terminate the lease.

It is also claimed by appellant, that the evidence wholly fails to show a termination of the lease—that the five days

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notice given to appellees was simply a threat, and they had no right to act upon it and vacate the premises.

Under the 8th section of the Landlord and Tenant Act, Ch. 80, Rev. Stat., the landlord may give such a notice, and the section then proceeds: "If the tenant shall not, within the time mentioned in such notice, pay the rent due, the landlord may consider the lease ended and sue for the possession, under the statute in relation to forcible entry and detainer, or maintain ejectment without further notice or demand."

It is true that section 9 provides that it shall not be necessary, in case of default in any of the terms of the lease, to give more than ten days' notice to quit, or of the termination of such tenancy, but we do not think that excludes the termination of a tenancy by the notice provided in section 8, as would seem to be intimated by the court in *Dickinson v. Petrie*, 38 App. 155. It has certainly been a common practice at the bar for twenty years past to make such a notice as the one given here, a basis for the termination of leases and suits of forcible entry and detainer by the landlord to regain possession of leased premises, and we think it is fully authorized by the statute. The termination of a tenancy by the notice prescribed in said section 8 is approved in *Farnam v. Hohman*, 90 Ill. 312, and *Howland v. White*, 48 Ill. App. 240.

The questions raised by appellant, that there is no evidence that this notice was served on appellees, that it is not shown that John M. Lonergan was the agent of appellee, Ellen Lonergan, were questions of fact for the jury, and we think there is sufficient evidence to justify a finding in the affirmative on both points.

This notice being served on appellees, and they being in receipt of the letter of April 21, 1896, threatening to close up Lonergan on April 22d, and to enter judgment on the lease against O'Donnell, appellees were entirely justified in taking appellant's agent at his word in the notice of April 17th, that unless the rent was paid on or before April 23d, the lease of said premises would be terminated, and pay the

rent to and including April 23d, and surrender possession of the leased premises.

And particularly was this course justifiable on the part of appellees when a provision of the lease made them liable for \$10 per day damages for every day possession should be withheld after the termination of the lease by lapse of time or otherwise.

There being no reversible error in the record, and the verdict of the jury being justified by the evidence, the judgment is affirmed.

**Anton J. Brachtendorf et al. v. John Frederick
Kehm et al.**

1. *PENDENTE LITE—Purchasers.*—A purchaser *pendente lite* takes subject to the rights of the parties to the suit as the same may be finally determined in the pending litigation.

2. *JUDGMENTS—Binding Effect of.*—Judgments and decrees bind equally parties and privies, and a purchaser *pendente lite* stands in the latter category.

3. *DECREES—Interlocutory, Not Reversible on Error.*—An interlocutory decree is not reversible on error.

4. *ASSIGNMENT OF ERROR—What Must be Set Forth.*—An assignment of error, like a pleading, must set forth errors which are available to all who join in it; if not good as to all it is not good as to any.

Bill for Partition.—Error to the Circuit Court of Cook County. The Hon. OLIVER H. HORTON, Judge, presiding. Heard in this court at the October term, 1897. Affirmed. Opinion filed December 16, 1897.

LOEB & ADLER, attorneys for plaintiffs in error.

JAMES A. PETERSON, attorney for defendants in error.

MR. PRESIDING JUSTICE ADAMS DELIVERED THE OPINION OF THE COURT.

The defendants in error filed a bill in the Circuit Court, October 23, 1896, praying for the partition of certain prem-

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ises therein described, and making Anton J. Brachtendorf, plaintiff in error, and others, defendants. Summons having been served on all the defendants and they having failed to answer, the bill was taken as confessed as against them November 20, 1896. January 15, 1897, a decree was entered finding the title to the premises as stated in the bill, decreeing a partition and appointing commissioners to make partition. The commissioners, April 16, 1897, reported that the premises were not susceptible of division, and appraised the same, and, on motion of the complainants, Eva Wildner was appointed a receiver of the premises, with power to take possession thereof, collect the rents and keep the premises in repair. Also, April 16, 1897, a decree was entered, finding that the premises were not susceptible of partition, without prejudice to the parties, and ordering a sale by the master on terms specified in the order. Eva Wildner filed her bond as receiver, and May 3, 1897, an order was entered granting leave to her to file a petition, and ruling Anton J. Brachtendorf, Helena Brachtendorf, and George Mentzel, receiver of Brachtendorf & Grein, to answer the petition before 10 o'clock A. M., May 6, 1897.

The petition alleges, among other things, that Brachtendorf & Grein occupied part of the premises as tenants from month to month, and that on March 22, 1897, the owners of the fee simple title to the premises served said tenants with notice to terminate the tenancy May 1, 1897, and that March 23, 1897, a like notice was served on George Mentzel, receiver for Brachtendorf & Grein; that March 29, 1897, Helena Brachtendorf, wife of Anton J. Brachtendorf went into possession; that April 29, 1897, Peterson, complainant's solicitor, found Mentzel, receiver, and another person, in possession of the premises, and exhibited to them a certified copy of the order appointing petitioner receiver; that April 30, 1897, petitioner found Carrie L. Marshall, agent of Helena Brachtendorf, in possession, and that, on demand made by petitioner, said Marshall refused to surrender possession; that certified copies of the order appointing petitioner receiver were exhibited to all parties in posses-

sion; that Helena Brachtendorf tendered petitioner the rent for the month of April, but petitioner refused to accept the same, etc. Petitioner prays for an order for delivery of possession to her; etc.,

Answer filed May 6, 1897, admits that, March 18, 1897, Brachtendorf & Grein were in possession of the premises, and alleges that on that day Mentzel was appointed receiver of the partnership assets of Brachtendorf & Grein, and took possession of the same, and was directed by the Circuit Court to advertise for bids for the leasehold interest of Brachtendorf & Grein; that March 24, 1897, in case of Anton J. Brachtendorf against Bernard Grein, in which said receiver was appointed, the complainant, Frederick Kehm, and the defendants, John William Kehm and Chas. Edward Kehm, filed their intervening petition to settle the same issues raised by the petition herein, which petition is still pending; that in said cause Mentzel, receiver, by order of the court, sold and assigned to Helena Brachtendorf all the leasehold interest of Brachtendorf & Grein in said premises, and that the parties to the cause, including said Wildner, were represented by their solicitor when said order was made; that said Helena has been in possession since March 31, 1897, and has offered and still offers to pay thirty dollars rent for the month of April, which petitioner refuses to receive; that said Helena offers to pay as high rent for said premises as any person will pay; that she paid, at receiver's sale, March 31, 1897, three hundred dollars for the leasehold interest of Brachtendorf & Grein in said premises, etc.

It appears from the answer that the order for the sale of the leasehold was made in the suit of Anton J. Brachtendorf v. Bernard Grein, in another branch of the Circuit Court.

May 19, 1897, the court entered an order by which, after reciting that all parties to said petition were represented in court, plaintiffs in error and others were ordered to deliver, forthwith, to the receiver Wildner, without further notice or demand therefor, possession of the premises described in

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the petition. Helena Brachtendorf was not a party to the bill for partition; Brachtendorf & Grein, whose leasehold interest she claims by her answer to have purchased, were parties. The decree of sale, after providing that upon confirmation of the sale a deed or deeds should be executed, proceeds as follows: "And it is further ordered, adjudged and decreed by the court, that upon the execution and delivery of the deed or deeds aforesaid, the grantee or grantees, his or their heirs, successors or assigns, be let into the possession of the portion of said premises so conveyed, and that any of the parties to this cause who may be in possession of the premises, or any part thereof, and any person who, since the commencement of this suit, shall have come into possession under them or either of them, shall, on the production of said master's deed, and the service of a certified copy of this decree, surrender possession thereof to such grantee or grantees," etc. Anton J. Brachtendorf and Barney Grein, who were defendants to the bill, were bound by this decree.

The bill, as before stated, was filed October 23, 1896, and Helena Brachtendorf became a purchaser of the leasehold interest of Brachtendorf & Grein March 24, 1897, as she avers in her answer to the petition of Wildner, receiver. Being a purchaser *pendente lite* she took subject to the rights of the parties to the suit, as the same might be finally determined in the pending litigation. *Yates v. Smith*, 11 Ill. App. 459; *Vanzant v. Vanzant*, 23 Ill. 536; *Dickson v. Todd et al.*, 48 Ill. 504.

In the last case the court say: "Judgments and decrees bind equally parties and privies, and a purchaser *pendente lite* stands in the latter category." *Ib.* 507; *Alwood v. Mansfield et al.*, 59 Ill. 496; *Ellis et al. v. Sisson et al.*, 96 Ill. 105.

In the last case the purchase *pendente lite* was at a sale on an execution issued on a judgment. *Dugger et al. v. Oglesby*, 99 Ill. 405.

The rights of Brachtendorf & Grein, privies in estate of Helena Brachtendorf, having been concluded by the decree of sale rendered April 16, 1897, her rights in the leasehold estate were also concluded thereby.

Helena Brachtendorf being the wife of Anton Brachtendorf, who was a defendant to the bill for partition, there is a strong presumption that she had actual notice of the bill.

The plaintiffs have assigned as error the appointment, April 16, 1897, of Eva Wildner as receiver. This was an interlocutory decree, and is not reversible on error. *Coates v. Cunningham*, 80 Ill. 467.

The other errors assigned all go to the order of May 19, 1897.

Anton J. Brachtendorf, one of the plaintiffs in error, has no interest whatever in the leasehold, formerly of Brachtendorf & Grein, whether the decree of sale in the partition suit, or the order of sale in the chancery suit mentioned in the answer of Helena Brachtendorf, is to be regarded. Helena Brachtendorf claims to be solely interested in said leasehold, and Anton J. Brachtendorf claims no interest and manifestly has none therein. Nevertheless the plaintiffs in error have joined in an assignment of errors. If the assignment is not good as to Anton J. Brachtendorf, neither is it as to Helena Brachtendorf, the other plaintiff in error. "An assignment of errors, like a pleading, must set forth errors which are available to all who join in it. If not good as to all, it is not good as to any." 2 Ency. of Pl. & Pr. 933, and cases cited.

It is a serious question whether the order of May 19, 1897, is a final order, reviewable on error, in reference to which we express no opinion, the question not having been raised by motion to dismiss the suit or otherwise.

The order of May 19, 1897, is affirmed.

Louis Braun v. Conrad Seipp Brewing Co.

1. FELLOW-SERVANTS—*Who Are, a Question of Fact.*—The question whether different servants of the same master are fellow-servants, within the legal signification of the term, is a question of fact to be determined from all the circumstances of each case, and the evidence bearing upon the question of whether the directions given by one servant were the acts

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of a fellow-servant or the acts of the master, should be submitted to a jury.

2. NEGLIGENCE—*Questions of, When to be Submitted to the Jury.*—When reasonable men, of fair intelligence, may draw different conclusions, the question of negligence must be submitted to the jury.

Trespass on the Case, for personal injuries. Error to the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Heard in this court at the October term, 1897. Reversed and remanded. Opinion filed December 18, 1897.

JAMES B. McCracken, attorney for plaintiff in error.

Where a master confers authority upon one of his employes to take charge and control of a certain class of workmen in carrying on some particular branch of business, such employe, in governing and directing the movements of the men under his charge, with respect to that branch of his business, is a direct representative of the master, and not a mere fellow-servant. All commands given by him within the scope of his authority are in law the commands of the master; and if he is guilty of a negligent and unskillful exercise of his power and authority over the men under his charge, the master must be held to answer. *Wenona Coal Co. v. Holmquist*, 152 Ill. 581; *Fraser & Chalmers v. Schroeder*, 163 Ill. 459; *Mobile & O. R. R. Co. v. Godfrey*, 155 Ill. 78; *Western Stone Co. v. Whalen*, 151 Ill. 472.

WINSTON & MEAGHER, attorneys for defendant in error; FREDERICK R. BABCOCK, of counsel.

Evidence tending to prove a cause of action must be more than a mere scintilla of evidence. It must be evidence upon which the jury could, without acting unreasonably in the eye of the law, decide in favor of the plaintiff or the party producing it. *Simmons v. Chicago & Tomah R. R. Co.*, 110 Ill. 340; *Bartelott v. International Bank*, 119 Ill. 259.

A party performing the same work, and working side by side with a party claiming the right to recover, and having no authority to discharge or employ the party injured, is a fellow-servant. *Illinois Cent. R. R. Co. v. Meyer*, 65 Ill. App. 531.

The proposition is elementary, that, the relation of co-servants being established, there can be no recovery from the master by one for an injury inflicted upon him through the negligence of his co-servant. Wood on Railroads, Vol. 3 (Minor's 2d Ed.), 1771; Rorer on Railroads, Vol. 2, 1187; Story on Agency (8th Ed.), Sec. 453; *Leeper v. Terre Haute & I. R. R. Co.*, 162 Ill. 215.

The words used by Surgiss in directing Smith to help move the wagon were not the act of a master, but the act of a fellow-servant, and if an accident happens from some negligence of the foreman, which negligence relates to the foreman's duties as a co-laborer with the person injured, and might just as readily happen with one of them having no such authority, the master is not liable. *Cleveland, C. & St. L. R. R. Co. v. Brown*, 73 Fed. Rep. 970; *Central R. R. Co. v. Keegan*, 160 U. S. 259; *Fitzgerald v. Honkomp*, 44 Ill. App. 365; *Starne, Dresser & Co. v. Schlothane*, 21 Ill. App. 97; *Nor. Pac. R. R. Co. v. Peterson*, 16 Sup. Ct. Rep. 843; *Nor. Pac. R. R. Co. v. Charless*, 16 Sup. Ct. Rep. 848; *Reed v. Stockmeyer*, 74 Fed. Rep. 186; *The Louisiana*, 74 Fed. Rep. 748; *Laughlin v. State (N. Y.)*, 11 N. E. Rep. 371; *Greene v. Western Union Tel. Co.*, 72 Fed. Rep. 250; *O'Brien v. Rideout (Mass.)*, 36 N. E. 792; *Martin v. Atchison, T. & S. F. R. R. Co.*, 17 Sup. Ct. Rep. 603; *Nor. Pac. R. R. Co. v. Poirier*, 17 Sup. Ct. Rep. 741.

MR. JUSTICE SEARS DELIVERED THE OPINION OF THE COURT.

This writ of error is brought to review a judgment rendered in the Circuit Court in an action on the case wherein plaintiff in error sought to recover damages for personal injuries sustained, as is alleged, through negligence of defendant in error.

At the conclusion of the evidence for the plaintiff, the trial court refused to give an instruction proffered by defendant, directing the jury to find a verdict of not guilty; but after the evidence for the defendant and rebuttal evidence for plaintiff had been heard, the court then directed the jury to find the defendant not guilty, and upon such verdict rendered judgment.

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The question presented is the sufficiency of the plaintiff's case for submission to the jury.

The facts as presented are substantially as follows:

On the day of the injury, Braun, the plaintiff in error, was employed as a painter in painting wagons for the Conrad Seipp Brewing Company, defendant in error. The work was done in the paint shop of defendant, and the wagons were hauled up to the second floor of the shop upon an incline running from the ground floor to the second floor. An ordinary windlass, with handlebars on each end, was used for raising and lowering the wagons to and from this paint shop. The windlass was about ten inches in diameter, around which a rope was wound, which was attached to the wagons and used in raising and lowering them. The rope ran from the windlass to a sheave and block, fastened to the roof, and from there down to the wagon. At the end of the windlass, at which Braun was at work at the time of the accident, there was what the witnesses called a dog, which was used as a brake to keep the windlass from turning round. This dog or brake was situated just above one of the handlebars of the windlass, and consisted of a cog-wheel and a bolt which dropped into it, and was so constructed that it would, when dropped in, stop the windlass.

There was testimony tending to show that this brake was used only to stop the windlass when raising wagons up the incline, and that it was not so used when lowering wagons.

On the day of the accident, a beer wagon was to be lowered down this incline. Surgiss, who is called by some of the witnesses "the foreman," ordered plaintiff and three boys in defendant's employ, to take hold of the handles of the windlass to let the wagon down. Surgiss attached the rope to the wagon, and took hold of the tongue to guide the wagon in its descent, and keep it on the incline.

There was a space of level flooring the width of the incline, extending back from the top of the incline about two feet and a half to a door sill. At this sill there was a drop of an inch or two, caused by the fact of the second floor being lower than the level of the floor leading to the incline.

Plaintiff and the three boys being at the handles, Surgiss started to back the wagon down the incline. The back wheels went over the sill and started downward, but the front wheels were stopped by the elevation at the sill, and Surgiss could not get them over. He then ordered one of the boys at the handles to come and help him release the front wheels. The boy responded to his call. The joint efforts of the boy and Surgiss succeeded in getting the front wheels over the sill, and the whole weight of the wagon then rested upon the rope attached to the windlass, as the wagon started to descend.

After the front wheels were over the sill, Surgiss sent the boy who was assisting him back to the handles, but before he could get back the accident had happened.

The wagon started down the incline, and the plaintiff and the two boys were unable to hold the windlass. It escaped from their control and kept revolving more and more rapidly, as the wagon gained momentum in its descent. One of the boys was thrown from the handles; the other let go; then the handle escaped from plaintiff's grasp, and revolving struck him several times on the arms, breaking them both in several places.

At the time of this occurrence, plaintiff was 25 years of age, and the two boys who were with him at the windlass were 19 and 15 years, respectively. The third boy, who was called away by Surgiss, was 18 years of age.

The third count of the declaration charges, in substance: Defendant (after ordering plaintiff and others to lower the wagon) negligently and recklessly called away and removed from said cranks one of the servants so assisting in lowering, well knowing that after said removal of one servant, an insufficient number remained to lower said heavy wagon; by reason of said negligence in calling him away, plaintiff and those remaining were unable to control the wagon; thereby the cranks began to revolve with great rapidity and escaped from plaintiff's control and the control of said servants, and the cranks struck plaintiff with great force and violence, injuring him, etc.

Upon these facts and this count of the declaration, plaintiff in error complains that the issues should have been left to the jury. In reply thereto defendant in error contends that the trial court properly directed the verdict, because, first, plaintiff failed to allege in his declaration that the servant of defendant through whose alleged negligence he was injured, was not a fellow-servant; second, the evidence shows (it is claimed) that such servant, viz., Surgiss, was a fellow-servant of plaintiff; and third, the evidence shows (it is claimed) that plaintiff was guilty of contributory negligence.

The first contention, viz., that the declaration is insufficient because it fails to allege that the servant of defendant, through whose negligence the injury was caused, was not a fellow-servant of plaintiff, can not be sustained. The declaration here alleges negligence *by defendant*. It states, not that defendant by its servant, but that defendant itself did the act complained of as negligence. Although the defendant is a corporation, and could act only by its agents or servants, yet this allegation is sufficient. It "excludes *ex vi termini* the theory that they (the negligent acts) were performed by parties for whose conduct the defendant was not responsible." *Libby et al. v. Scherman*, 146 Ill. 540.

The second contention is that the evidence shows that Surgiss was in fact a fellow-servant of plaintiff, and hence plaintiff can not recover against the master for negligence of Surgiss. We think that it should have been left to the jury to determine as to this question of fact.

"The general rule recognized by the repeated decisions of this court is, that the question whether different servants of the same master are fellow-servants, within the legal signification of that term, is a question of fact, to be determined by the jury from all the circumstances in each case." *Mobile & O. R. R. Co. v. Massey*, 152 Ill. 144.

Braun, the plaintiff, testified: "The foreman of the paint shop where I worked was Mr. Surgiss. The foreman told me to help the boys let the wagon down. The foreman called the boy over to help him get the front wheels over."

Smith and Jelick, witnesses for plaintiff, and Taylor and

Standmaier, witnesses for defendant, all refer to Surgiss as "the foreman." Taylor, testifying on behalf of defendant, said: "Our foreman was Mr. Surgiss. I worked under his orders." Surgiss testified: "His (plaintiff's) duties were to be a laborer, to assist the painters and also me, and do painting work, etc. I do not employ and discharge men in the paint shop. I have not the authority. When there is a man to be discharged I have to report it to the president. I act under a superior, and get my orders with reference to the paint shop from the office. I work right with the men, painting just the same as they. Louis Braun (plaintiff) was the oldest man I had there. I says to him, 'You take the side of the brake and be responsible for it, each and every time.' The side Braun (plaintiff) stood on I always put him. I gave him full instructions how to use the brake. I said, 'Get ready, Louis (plaintiff), take your side and direct the men on the windlass, and I will take the truck.' I attached the rope, and put him in charge of the windlass."

There is nothing in the evidence to indicate that there was any one in the paint shop, or any one elsewhere save the president, superior to Surgiss in authority, to manage the paint shop.

We think that the evidence bearing upon the question of whether the directions given by Surgiss were the acts of a fellow-servant of plaintiff, or the acts of the master, should have been submitted to the jury.

The third contention is that the evidence shows that plaintiff was guilty of contributory negligence, in that, when one of the boys assisting him in holding the windlass was called away by the order of Surgiss, and the plaintiff and the remaining two boys proved unable to hold the windlass, the plaintiff then failed to make use of the brake to hold the windlass.

The plaintiff testified: "The reason I didn't let go was, I thought I was tending to my business, which I was told to do. We used this brake, or dog, only when we took trucks up; we couldn't use it in lowering them, because it went around fast; we couldn't put it in, and it wasn't strong enough to hold it."

Merkel v. William Schmidt Baking Co.

Surgiss testified: "You can place the brake while the windlass is revolving without being struck with the handle. If the wagon had not got to going fast, it could have been stopped short by applying this brake."

We hold that the facts here come within the rule that when reasonable men, of fair intelligence, might draw different conclusions, the question of negligence must be submitted to the jury. *Chicago & N. W. Ry. Co. v. Hansen*, 166 Ill. 623.

It can not be maintained that the risk incident to the withdrawal of one of the boys from the windlass by order of Surgiss, could by any possibility be construed to be an assumed risk, and the only question presented by the facts as to the conduct of plaintiff in the emergency which arose, is a question of contributory negligence, and that was, under the facts here, a question for the jury.

The judgment is reversed and the cause remanded.

Paul Merkel v. William Schmidt Baking Co.

1. *APPEAL—From an Order Granting an Injunction.*—No appeal lies from an order granting an injunction, except by virtue of the statute.

2. *SAME—Order for, to Appear in the Record.*—The record should show some order of the court as the basis for an appeal.

BILL, for an injunction. Appeal from the Superior Court of Cook County; the Hon. HENRY M. SHEPARD, Judge, presiding. Heard in this court at the October term, 1897. Appeal dismissed. Opinion filed December 16, 1897.

MAX ROBINSON, attorney for appellant.

WM. M. JOHNSON, attorney for appellee.

MR. JUSTICE WINDES DELIVERED THE OPINION OF THE COURT.

A bill was filed by appellee in the Superior Court of Cook

County, by which it was prayed that an injunction, to be directed to appellant, restraining him from soliciting the trade of divers of customers of appellee who comprise Bowmanville route, and from making sales of bakery goods or breadstuffs, or soliciting trade of any person in any territory known as Bowmanville route, issue. Indorsed on the bill appears the following:

"I hereby recommend that a writ of injunction issue in accordance with the prayer of the within bill of complaint, without notice, upon complainant filing bond in the penal sum of one thousand dollars with sureties to be approved by the clerk. Dated September 9, 1897.

HIRAM BARBER,
Master in Chancery.

Underneath which appears also the following: "H. M. Shepard, Judge. September 10, 1897."

The abstract shows there was an injunction bond signed by complainant, with surety in the sum of \$1,000, approved by the clerk, and an appeal bond by appellant from "interlocutory order of injunction," approved by the clerk of the Superior Court on September 30, 1897. The abstract shows no further recitals of these bonds.

There does not appear from the abstract or from the record, to have been any order of the court that an injunction issue, or that in fact, a writ of injunction was issued, except as may be inferred from the recommendation of the master in chancery, and of the judge above set forth, and the fact that the court refused on motion of appellant, to dissolve "the injunction heretofore granted;" and also that the court allowed an amendment to the bill "without prejudice to the injunction granted in this cause;" that on the 18th day of October, 1897, an application of the complainant for a rule upon the defendant in said cause, to show why he should not be attached for contempt in violating "the injunction issued" was referred to a master in chancery; and that afterward, on the same day, the court examined the surety upon the injunction bond as to its sufficiency, and approved said bond as to its form and sufficiency "without prejudice to the injunction issued herein."

In the record the clerk has given a certified copy of the injunction bond, which recites, among other things, that a bill had been filed by appellee against appellant, praying "an injunction to restrain the above named defendant from soliciting trade in bakery goods or breadstuffs of any person or persons included in the territory known to the parties hereto as the Bowmanville route, in the county of Cook," and that the court had "allowed an injunction for that purpose, according to the prayer of said bill," upon said appellee giving bond and security as provided by law.

Said clerk also certified a copy of a certain appeal bond given by appellant, which recites, among other things, that said appellee did on the 10th day of September, 1897, in the Superior Court of Cook County, "on an interlocutory order obtain an injunction against said defendant, Paul Merkel, restraining him from soliciting the trade of divers of customers of the William Schmidt Baking Company, the complainant, who comprise the Bowmanville route, and from making sales of bakery goods or breadstuffs, or soliciting the trade of any person included in the territory known as Bowmanville route."

There is no certificate of the clerk of the Superior Court in the record, that the transcript filed in this court is complete, and for aught that we can tell there may never have been an injunction order, or may be an injunction order and writ, which may or may not be the same as recited in the injunction bond or the appeal bond, as each bond recites a different order.

As the record contains neither order nor writ of injunction, we are at a loss to tell what, if any, order was made or writ of injunction issued by the Superior Court.

In this class of cases appeals are, by the statute, allowed from an interlocutory order or decree entered in any suit pending in any court of this State, granting an injunction, etc., to this court. No appeal lies from an order granting an injunction, except by virtue of the statute.

The record should show some order of the court as the basis for an appeal.

In absence of an order for injunction in the record we feel constrained to dismiss the appeal in this case, of the court's own motion, which is done accordingly. Appeal dismissed.

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Frances L. Hobbie, Executrix, etc., et al. v. Marianna A. Ogden et al.

1. **DEEDS—Construction of Terms Used in.**—The words "his heirs" as used in a conveyance of real estate can neither be ignored nor treated as words of limitation. Although they are usually words of limitation, yet they are held to be words of purchase when used with the word "or" indicating substitution, and in reference to a certain fixed time of distribution, as after the termination of an intermediate estate.

2. **REAL PROPERTY—Vesting of Remainders.**—When the gift of a remainder is made only by direction to distribute in the future, and not by any antecedent words of gift, the vesting of such remainder is deferred to the time of distribution.

3. **SAME—Exceptions to Rule Before Stated.**—There is a well defined exception to the general rule, viz., to the effect that even though there be no antecedent words of gift and no other gift than in the direction to pay or distribute in the future, yet if such distribution appear to be postponed for the convenience of the fund or property alone and not at all for reasons personal to the donee, then the gift in remainder vests at once and will not be deferred until the period of distribution arises.

4. **WORDS AND PHRASES—"His Heirs."**—The word "heirs" in its ordinary and general acceptation implies heirs at the time of the ancestor's death; in the strict and technical import, it applies to the persons appointed by law to succeed to the estate in case of intestacy; and when the word occurs in a will it will be held to apply to those who are heirs of the testator at his death unless the intention of the testator to refer to those who shall be his heirs at a period subsequent to his death is plainly manifested in the will.

5. **PRACTICE—When Counsel Must Indicate What he Expects to Prove.**—Where exceptions are taken to the rulings of the trial court in sustaining objections to questions propounded to a witness, counsel must indicate to the court what it is proposed to show by the answer to such questions. Unless this is done such rulings can not be reviewed for error.

Bill, for the construction of a deed. Appeal from the Circuit Court of Cook County; the Hon. OLIVER H. HORTON, Judge, presiding. Heard in this court at the October term, 1897. Affirmed. Opinion filed December 16, 1897.

STATEMENT OF THE CASE.

The questions presented in this case relate to the construction of the terms of a deed made in the year 1853, by Albert G. Hobbie and Eleanor O. Hobbie, conveying certain real property in the city of Chicago to William B. Ogden, in trust, for the purposes and upon the trusts in the deed set forth. The deed is substantially as follows:

Made the 21st day of May, 1853, between Albert G. Hobbie and Eleanor O. Hobbie, and William B. Ogden, trustee, witnesseth: Whereas a decree of divorce between Albert G. Hobbie and Eleanor O. Hobbie has this day been entered in the Cook County Court of Common Pleas, by which it is ordered that said Albert G. Hobbie and Eleanor O. Hobbie shall convey by deed to William B. Ogden, trustee, the premises hereinafter described, now, therefore, in pursuance of said decree and for the purpose of carrying out the same, and for providing for the support and maintenance of said Eleanor O. Hobbie during her natural life, and for the support and education of Lydia Harper Hobbie and Orlanda Reeves Hobbie, daughters of said Eleanor, the said Albert G. Hobbie and the said Eleanor O. Hobbie do hereby grant, convey, etc., unto said Ogden, in trust, as hereinafter stated, in fee simple, lots, etc., (describing certain lots situated in Chicago, Cook county, Illinois,) to have and to hold said premises unto the said Ogden upon the following trusts and conditions, to wit:

First. To pay all taxes and assessments upon the property and fund hereby created, and such reasonable costs and expenses as may be necessary in the execution of this trust, including a reasonable compensation to the trustees.

Second. To pay said Eleanor O. Hobbie the rents, issues and profits of said property for the support of herself and the support and education of her children, Lydia Harper Hobbie and Orlanda Reeves Hobbie, until the sale of the premises as herein provided.

Third. To sell said premises in whole or in parcels at as early a period as the same can be done without sacrifice, upon the best terms possible, either for cash or on credit,

and upon such sale to make all such conveyances as may be necessary to vest in the purchaser a good and sufficient title to the same.

Fourth. To invest and reinvest from time to time, the fund so arising from such sale by loaning the same at the highest rate of legal interest, such loans to be secured upon unincumbered real estate of at least double the value of the amount secured thereon, exclusive of buildings and improvements thereon.

Fifth. The interest arising, either from the credit given on sales, or from the loaning of the fund, to be paid semi-annually to the said Eleanor O. Hobbie during her natural life, for the support of herself and the support and education of her said two daughters, Lydia and Orlanda.

Sixth. Upon the death of the said Eleanor O. Hobbie, said trustee shall transfer, convey, pay over and deliver to the said Albert G. Hobbie, or his heirs, the said trust fund and the property, assets and securities arising out of or belonging to the same, excepting only therefrom the rents, issues, profits and interest paid to the said Eleanor O. Hobbie, as hereinbefore provided, and the costs, expenses and disbursements incurred in the execution of this trust.

And the said Albert G. Hobbie hereby covenants with said trustee that the said premises are free and clear from all incumbrance, and that he is seized of a perfect, sure and absolute title in fee simple, and has full power to convey the same, and the said premises against any person lawfully claiming or to claim the same he will forever warrant and defend.

And the said William B. Ogden, as aforesaid trustee, hereby covenants and agrees to accept this trust, and to well and faithfully perform, fulfill and execute all and singular the trusts hereinbefore declared, according to the tenor and effect, true intent and meaning thereof.

In witness whereof, the said parties have hereunto set their hands and seals the day and year first above written.

(Signed) ALBERT G. HOBBIÉ, [SEAL.]

ELEANOR O. HOBBIÉ, [SEAL.]

W. B. ODGEN. [SEAL.]

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On August 29, 1855, after the decree of divorce and the making of the said deed, Albert G. Hobbie intermarried with Frances L. Hobbie, and a few years later Eleanor O. Hobbie intermarried with Leander Read.

Three children were born of the marriage of Albert G. Hobbie and Eleanor O. Hobbie, viz.: William M. Hobbie, Lydia Harper Hobbie and Orlanda Reeves Hobbie; and two children were born of the marriage of Albert G. Hobbie and Frances L. Hobbie, viz.: Isaac R. Hobbie and Walter S. Hobbie. On May 13, 1868, Albert G. Hobbie died testate, leaving him surviving his widow and the five children above named. About the year 1865, Ogden, as trustee, sold the realty conveyed to him by the deed above set forth, to Leander Read, husband of Eleanor O. Read, for the sum of \$20,000. In 1877 Ogden died testate.

On the 11th of April, 1879, the sum of nine thousand dollars was paid by the executrix and trustees of the will of William B. Ogden, to Eleanor O. Read, and a release was executed, reciting such payment as consideration, by Eleanor O. Read and husband, Lydia Harper Cone, formerly Lydia Harper Hobbie, and Orlanda Reeves Brown, formerly Orlanda Reeves Hobbie, which release is as follows:

"In consideration of nine thousand (9,000) dollars to us in hand paid, and other good and valuable considerations to us and each of us moving, we, Eleanor O. Read, heretofore Eleanor O. Hobbie, and Leander Read, her husband, and Lydia Harper Cone, and Orlanda Reeves Brown, daughters of said Eleanor O. Read, do hereby release and discharge Marianna A. Ogden, Edwin H. Sheldon, Andrew H. Green, William O. Wheeler and William E. Strong, executors and trustees under the last will and testament of William B. Ogden, deceased, and also the heirs, devisees and personal representatives of said William B. Ogden, deceased, from all and every claim and demand of every nature and kind, and from all liability to us or either of us, in any manner or way, by reason of said William B. Ogden being the trustee in a certain deed of trust bearing date the 21st day of May, A. D. 1853, between Albert G. Hobbie

and Eleanor O. Hobbie, party of the first part, and the said William B. Ogden, party of the second part, or by reason of any money or security in any way controlled by said Ogden, or passing into or through his hands as such trustee; the said trust created by said instrument having been fully and entirely discharged to the satisfaction of the parties hereto, who have thereupon, as aforesaid, released and discharged, and do hereby release and discharge, all liability or obligation to them, in any manner or way, further releasing all the said parties hereinbefore mentioned from any and all liability of any nature or kind to us, or either of us, for any matter or thing whatsoever.

In witness whereof we have hereunto set our hands and seals this 11th day of April, A. D. 1879.

(Signed) ELEANOR O. READ, [SEAL.]

LEANDER READ, [SEAL.]

LYDIA HARPER CONE, [SEAL.]

ORLANDA REEVES BROWN. [SEAL.]

Acknowledged and witnessed before C. H. Ferry."

Just what amount of interest arising from the trust fund had been paid to Eleanor O. Read prior to the date of this release, is a matter of uncertainty. It does, however, appear that the sum of \$1,809.11 was paid to her on account of said trust in the year 1875.

Frances L. Hobbie, the widow of Albert G. Hobbie, is now sole executrix of his last will. Marianna A. Ogden, William A. Wheeler and Andrew H. Green are executrix and trustees of the last will of William B. Ogden.

The conflict of interests arises in the construction to be put upon the sixth item or clause in the trust provisions of the deed before set forth, and relates to the disposition of the remainder after the life interest of Eleanor O. Read, now deceased.

By her bill, filed in the Circuit Court of Cook County, Frances L. Hobbie, as executrix of the will of Albert G. Hobbie, prays an accounting by the executrix and trustees of the will of William B. Ogden, the trustee in said deed; and by her cross-bill in the same cause, Lydia Harper Cone,

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formerly Lydia Harper Hobbie, also prays for an accounting by said executrix and trustees of the will of Ogden, as to her alleged interest in the trust fund, and that they may be decreed to pay over to her one-third part of said trust fund, with interest, etc. The answers of the executrix and trustees of the will of William B. Ogden to both bill and cross-bill, deny any right in complainant or cross-complainant to any of the relief prayed, and set up as against the equities of Lydia Harper Cone the release heretofore described. Hearing was had in the Circuit Court upon bill and cross-bill, answers and replications thereto, and a decree entered dismissing both bill and cross-bill for want of equity. From that decree this appeal is prosecuted by complainant and cross-complainant.

WILLIAM R. HUNTER, attorney for appellant Frances L. Hobbie; MARVIN BLANCHARD, of counsel.

The law favors the vesting of estates, and will construe the terms of an instrument as creating a vested interest if possible. *Ducker v. Burnham*, 146 Ill. 22; *Scofield v. Olcott*, 120 Ill. 362; *Kellett v. Shepard*, 139 Ill. 433; 4 Kent, 203.

The law presumes the words of postponement relate to the enjoyment of the remainder rather than to the vesting thereof, and the intent to postpone the vesting of the estate must be clear and manifest. *Ducker v. Burnham*, 146 Ill. 22; *Heilman v. Heilman*, 129 Ind. 59.

"A remainder is vested in interest where a person is in being and ascertained, who will, if he lives, have an absolute and immediate right to the possession of the land upon the ceasing or failure of all the preceding estates, provided the estate limited to him by the remainder shall so long last." *Hawley v. James*, 5 Paige (N. Y.) 466.

PENCE & CARPENTER, attorneys for appellant Lydia Harper Cone, contended that the words "or his heirs," are technically words of limitation, but in this case they are used as words of purchase, and always have that operation

when it sufficiently appears that the term is used to designate a particular person or a class of persons who may stand in that relation at the happening of a certain event, or at a certain period. No one can have heirs while living, and the word "or," therefore, as here used, indicates substitution, and the payment or distribution is to be made upon the termination of the immediate estate—that is, upon the determination of the estate of the divorced wife by her death; and that the estate then became vested for the first time upon the death of Eleanor O. Hobbie, and that the persons who were to take are such persons as would be the heirs at law of Albert G. Hobbie, and who were living at the time the estate became vested, which is the time of distribution. The word "heirs" in this connection is simply *descriptio personarum* and is not a word of limitation. Ebey v. Adams, 135 Ill. 80; Salisbury v. Petty, 3 Hare, 86; Girdlestone v. Doe, 2 Sim. 225; Rob v. Belt, 12 B. Mon. (Ky.) 643; Wren v. Hynes' Adm., 2 Metc. (Ky.) 129; In re Porter's Trust, 4 Kay & J. 188; Cripchase v. Simpson, 16 Sim. 485; Crooke v. De Vandes, 9 Ves. 199; Montague v. Nucella, 1 Russ. 165; Gittings v. McDermott, 2 Myl. & K. 69; Blundell v. Chapman, 33 Beav. 648; Penley v. Penley, 12 Beav. 547; Jacobs v. Jacobs, 16 Beav. 557; Finlason v. Tatlock, L. R., 9 Eq. 258; Timmins v. Stackhouse, 27 Beav. 434; 1 Jarman on Wills (Bigelow's Ed.), p. 516; Butler v. Bushnell, 3 Myl. & K. 232.

The principle distinguishing a contingent from a vested estate in personal property is this: That where there is a present or immediate gift and the payment is postponed to some future day, then such gift is vested; but where there is no gift except in the directions to pay over or divide the estate, then such gift becomes vested only upon the happening of the event upon which the estate is to be distributed.

The subject-matter in controversy is personal property, Land devised to be sold and the proceeds distributed, is a devise of the proceeds and not of the land. Ebey v. Adams, 135 Ill. 80; Crerar v. Williams, 145 Ill. 640; Baker v. Copenbarger, 15 Ill. 103; Jennings v. Smith, 29 Ill. 116.

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The doctrine is that every person claiming property under an instrument directing its conversion, must take it in the character which that instrument has imposed upon it, and its subsequent devolution and disposition will be governed by the rules applicable to that species of property. *Strode v. McCormick*, 158 Ill. 146.

A present interest only passes by deed, discharge or release, unless a future or contingent interest is expressly mentioned in the instrument and is sought thereby to be transferred, controlled, disposed of or released. *Rich v. Lord*, 18 Pick. 322; *Glover v. Condell*, 163 Ill. 566; *Striker v. Mott*, 28 N. Y. 82.

WILSON, MOORE & McILVAINE, attorneys for appellees.

“Ordinarily, the words ‘heirs,’ or ‘heirs at law,’ are used to designate those persons who answer this description at the death of the testator. The word ‘heir,’ in its strict and technical import, applies to the person or persons appointed by law to succeed to the estate in case of intestacy. *Kellett v. Shepard*, 139 Ill. 433; 2 Black. Com. 201; *Rawson v. Rawson*, 52 Ill. 62. Hence, where the word occurs in a will, it will be held to apply to those who are heirs of the testator at his death unless the intention of the testator to refer to those who shall be his heirs at a period subsequent to his death, is plainly manifested in the will. This construction or definition is not changed by the fact that a life estate may precede the bequest to the heirs at law, nor by the circumstances that the bequest to the heirs is contingent on an event that may, or may not happen. 2 Jarm. on Wills, 672, R. & T. 5th Am. Ed.; 2 Wms. on Ex’rs, 1211, 6th Am. Ed.

A direction that personal property shall be divided at the expiration of an estate for life creates a vested interest. *McArthur v. Scott*, 113 U. S. 380; *Shattuck v. Stedman*, 2 Pick. 467; *Hallifax v. Wilson*, 16 Ves. 168; *In re Bennett’s Trust*, 3 K. & J. 280; *Strother v. Dutton*, 1 DeG. & Jones 675.

MR. JUSTICE SEARS DELIVERED THE OPINION OF THE COURT.
In order to pass upon the rights of complainant and cross-

complainant, as disclosed by bill and cross-bill respectively, it becomes necessary to determine in whom and when the remainder of the trust fund vested by the terms of the sixth clause of the trust provisions. The sixth clause provides that "Upon the death of the said Eleanor O. Hobbie, said trustee shall transfer, convey, pay over and deliver to the said Albert G. Hobbie, or his heirs, the said trust fund," etc.

The alleged rights of Frances L. Hobbie, as executrix of the will of Albert G. Hobbie, rest upon the proposition that by the terms of this sixth clause the remainder in the fund, subject to the life use of Eleanor O. Hobbie, at once vested in Albert G. Hobbie upon the delivery of the deed, and therefore was disposed of by general devise (including all his property) in his last will. To test the correctness of this proposition, it is necessary to determine the effect to be given to the words "or his heirs" in the gift or grant of the remainder; and to sustain the proposition, it would be necessary to give no effect whatever to the words "or his heirs," or to give them the effect of words of limitation only.

We think the authorities, both in this State and elsewhere, clearly settle that the words can neither be ignored nor treated as words of limitation. Although the words "heirs" and "his heirs" are usually words of limitation, yet they are held to be words of purchase when used as here, with the word "or," indicating substitution, and in reference to a future fixed time of payment or distribution, as after the termination of an intermediate estate. *Ebey v. Adams*, 135 Ill. 80.

In the case cited the question arose upon the use of the words "or their heirs" in a devise. The provision of one clause of the will was that "upon the death or remarriage of my wife, it is my will and I so direct, that all my estate, etc., shall be sold on terms, etc., and from the proceeds they (executors) will pay (certain legacies) and the balance of my estate my executors are hereby directed to distribute among my children, or their heirs, to wit (naming children), etc. The court in construing the words "or their heirs" say: "The direction, it will be observed, is to distribute

the residue of the proceeds of the testator's estate among his children or their heirs. * * * The words 'heir' or 'their heirs' are technically words of limitation; but in this and other cases they are used as words of purchase, and always have that operation when it sufficiently appears that the term is used to designate a particular person or particular persons, who may stand in that relation at the happening of a certain event, or at a certain period, and not to the whole line of heirs in succession." Quoting from Redfield on Wills, the opinion says: "The cases where the word 'or' being interposed between the names of the first devisee or legatee, and his heirs, has been held to indicate the intention of substituting the latter in place of the ancestor, are numerous, and being more recent, as a general thing, and more in consonance with the words used, must be regarded as defining the most reliable rule." 1 Redfield on Law of Wills, 486. The opinion cites as supporting this construction, 1 Jarman on Wills, 514-521; Salisbury v. Petty, 3 Hare, 86; Girdlestone v. Doe, 2 Sim. 225; Gittings v. McDermot, 2 M. & K. 69; Price v. Lockley, 6 Beav. 180; Doody v. Higgins, 9 Hare App. 31; In re Craven, 23 Beav. 333; Rob v. Belt, 12 B. Mon. 643; Wren v. Hynes' Adm., 2 Metc. (Ky.) 129.

We conclude, therefore, that the words "or his heirs" as used in this deed, are words of purchase, and not words of limitation. In reaching this conclusion we necessarily hold that the gift of the remainder was an alternative or substitutional gift. That the language of the deed is, in effect, as if it had directed in terms that the trustee pay the remainder, after the death of Eleanor O. Hobbie, to Albert G. Hobbie, if he be then living, or, in the event of his death before the death of Eleanor, then to his heirs. That such alternative or substitutional gift of a remainder may be made by deed as well as by will, is settled in City of Peoria v. Darst, 101 Ill. 609, wherein the court in construing a deed, quote from Dunwoodie v. Reed, 3 Serg. & R. 452, as follows: "But two or more several contingent remainders in fee may be limited, the one to be substituted for the other,

instead of being dependent and to take effect in succession." Our consideration thus far disposes only of the alleged rights of Frances L. Hobbie, as executrix, by the determination that the gift of the remainder was, as to Albert G. Hobbie and his heirs, a substitutional gift, and hence contingent, and that no title to the remainder vested in Albert G. Hobbie prior to his death, and hence no rights could have accrued to his executrix under his will.

It being determined that the heirs of Albert G. Hobbie were by his death substituted for him as takers of the remainder and by purchase under the deed, the question now arises, did the remainder vest in those who were his heirs at the time of his death *eo instanti*, or was the remainder yet contingent as to such heirs, *i. e.*, contingent as to each heir upon his or her survival beyond the intermediate estate. In other words, did the remainder vest in such as were heirs of Hobbie at his death, or in such only as could come under the designation "his heirs" living when the period of distribution arrived.

The deed here disposes of the remainder by words of distribution only, that is to say, it contains no antecedent words of gift, and the gift of the remainder is effected only by the direction to distribute upon the termination of the intermediate estate.

It is well settled, as a general rule, that where the gift of a remainder is made only by direction to distribute *in futuro* and not by any antecedent words of gift, the vesting of such remainder is deferred to the time of distribution. The leading case announcing this rule is that of *Leake v. Robinson*, 2 Mer. 363, quoted from with approval in *Blatchford v. Newberry*, 99 Ill. 45, and *McCartney v. Osburn*, 118 Ill. 403, which latter case was followed by *Kingman v. Harmon*, 131 Ill. 171.

But there is a well defined exception to this general rule, viz.: To the effect that even though there be no antecedent words of gift, and no other gift than in the direction to pay or distribute *in futuro*, yet if such payment or distribution appear to be postponed for the convenience of the fund or

property alone, and not at all for reasons personal to the donee, then the gift in remainder vests at once, and the vesting will not be deferred until the period of distribution arrives. *Scofield v. Olcott*, 120 Ill. 362.

In this case Mr. Justice Magruder, delivering the opinion of the court, says: "But even though there be no other gift than in the direction to pay or distribute *in futuro*, yet if such payment or distribution appear to be postponed for the convenience of the fund or property, as when the future gift is postponed to let in some other interest, for instance, if there is a prior gift for life, or a bequest to trustee to pay debts, and a direction to pay upon the decease of the legatee for life, or after payment of the debts, the gift in remainder vests at once, and will not be deferred until the period in question. But where the payment is deferred for reasons personal to the legatee, the gift will not vest till the appointed time. 2 *Jarman on Wills* (R. & T.'s Ed.), 458; *Theobald's Law of Wills*, 412. Thus, a gift to a person, if or when he shall attain a certain age, will not vest until the age is attained. *Idem*. In other words, if the reason for the postponement is the position of the fund, the bequest in remainder vests at once; but if it is the position of the legatee, the remainder is contingent. In *re Bennett's Trusts*, 3 *Kay & J.* 280." See also *Ducker v. Burnham*, 146 Ill. 9; *Carper v. Crowl*, 149 Ill. 465.

We have seen that the gift of the remainder in this deed is affected only by the direction for distribution *in futuro*, and hence that it would fall within the general rule; unless, by reason of the purpose of the postponement of the distribution, it falls within the exception to the rule which has been noted. It remains then to determine whether the postponement here was solely for the convenience of the fund, or as well for reasons personal to the donees.

That the primary purpose of postponement was for the convenience of the fund, is apparent. The deed was made to comply with the command of the court, expressed in its decree, and for the purpose of providing for the support and maintenance of Eleanor O. Hobbie during her natural life,

and the support and education of her daughters. The postponement of distribution and the precise limit of the postponement is fixed by this primary purpose of the deed, viz., to create an intermediate estate during the lifetime of Eleanor O. Hobbie, and that is to say, that it was a postponement for the convenience of the estate or fund. This much may be gathered with certainty from the recitals of the deed, but the further question must be answered—was there not coupled with this primary purpose of postponement, another purpose, viz., a purpose to postpone the distribution in contemplation of the survivorship of such of those who might be heirs of Albert G. Hobbie at his death if he predeceased Eleanor, as should outlive the intermediate estate and be living at the period of distribution—that is to say, a purpose to postpone distribution for reasons personal to the donee?

There are no words contained in the deed which directly indicate any such purpose. The words "his heirs" are not coupled with any limitation, such as "then surviving," or "then living." The word "heirs" in its ordinary and general acceptation, implies heirs at the time of the ancestor's death. *Kellett v. Shepard*, 139 Ill. 433; *Minot v. Tappan*, 122 Mass. 535; *Dove v. Torr*, 128 Mass. 38.

In the former case, *Kellett v. Shepard*, the court say: "Ordinarily, the words 'heirs' or 'heirs at law,' are used to designate those persons who answer this description at the death of the testator. The word 'heirs,' in its strict and technical import, applies to the person or persons appointed by law to succeed to the estate in case of intestacy. 2 Blackstone Com. 201; *Rawson v. Rawson* 52 Ill. 62. Hence, where the word occurs in a will, it will be held to apply to those who are heirs of the testator at his death, unless the intention of the testator to refer to those who shall be his heirs at a period subsequent to his death is plainly manifested in the will. This construction or definition is not changed by the fact that a life estate may precede the bequest to the heirs at law, nor by the circumstance that the bequest to the heirs is contingent on an

event that may or may not happen. 2 Jarman on Wills, 672, R. & T. 5th Am. Ed.; 2 Williams on Ex'rs, 1211, 6th Am. Ed."

In *Minot v. Tappan*, *supra*, the court say: "The general rule is well settled that a bequest or devise to the 'heirs' or the 'heirs at law' of a testator will be construed as referring to those who are such at the time of the testator's death, unless a different intent is plainly manifested by the will. We are unable to find in this will any decisive indications that the testator in the clause we are considering, intended by his 'heirs at law' those who should be such at the death of his son George, without issue. There are no words of contingency such as 'if they shall be living at his death,' or 'to such of my heirs as shall be then living,' which would naturally be used if the intention were to limit the devise or bequest *to such of the class as should be then living*. * * *

The fact that the clause in question contains a direction that the trustees are, in default of issue of George, to 'convey and transfer the same to my heirs at law,' has but little significance to show the intention of the testator, because, upon either construction, such a direction is necessary or suitable, in order to terminate the trust estate and convert the equitable estates of the heirs at law into legal estates. In this case, the clause to be construed provided for an intermediate life use, during the life of the testator's son George, and (with other provisions) that in default of any such child or children (of George) or issue (of any such child) then living, then in trust to convey and transfer the same to my heirs at law," etc.

But it is contended that where a gift of remainder is made by words directing a distribution *in futuro*, and a class is designed as donees, none can be permitted to take except such as are *in esse* and of the class at the time of distribution; and it is argued that the words "his heirs" designate a class, and hence come within the rule. In support of this contention counsel cite *Handberry v. Doolittle*, 38 Ill. 202; *McCartney v. Osburn*, 118 Ill. 417; *Ebey v. Adams*, 135 Ill.

80; Strode v. McCormick, 158 Ill. 142; Sears v. Russell, 8 Gray, 86.

We examine the cases cited to learn whether the effect of these decisions is to hold that the use of a word designating a class in the instances given, is of itself conclusive of a contemplation of survivorship, and hence of a reason of postponement personal to the donee; or whether, under the facts of each case some special reason is found for holding the use of such a word to have there indicated such purpose.

In the case of Handberry v. Doolittle, *supra*, there was a devise of one-fourth of the estate to a brother, A.; one-fourth to a brother, G.; one-fourth to the children (naming them) of a brother, I., and one-fourth to "the children" (not naming them) of a brother R. There was no intermediate estate for life devised. The will provided specifically as to the children of R., that they "shall likewise take by survivorship from each other." It will therefore be perceived that the question here occurring could not have arisen in that case. The only effect of the decision there was to hold that a child of R., born after the death of the testator, took an interest. And as to that the court say: "But apart from this rule of construction, there is a peculiarity in the phraseology of the will, which indicates it to have been the clear intent of the testator to include any after-born children of his brother Rawley. In providing for the children of his deceased brother Irwin, he devises to them by their proper names instead of describing them merely as children of his brother. But as his brother Rawley was still living and might have more children, instead of devising to them by their proper names, he simply devises to them as a class, using the generic term, children. Why this difference in the two cases, unless he had in view the possible after-born children of Rawley?"

In McCartney v. Osburn, *supra*, the cause of the will in controversy expressly provided for division between "the heirs of the said Henrietta that may be living at the time of said division."

In Ebey v. Adams, *supra*, the direction was to distribute

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the remainder among his children, or their heirs, and the decision was that it was an alternative or substitutional devise, and that only such children could take as survived the period of distribution. The words there to be construed were "the children," not the words "or their heirs." And "the children" were held to be only alternative takers, for whom "their heirs" might be substituted if the children did not survive until the time of distribution. "The children" in that case occupied precisely the position which Albert G. Hobbie occupied here, viz., the first taker named with possibility of substitution of another in the event of the death of the first taker before distribution. The interest of the children was there held, as the interest of Albert G. Hobbie is here held, to have been contingent. There was no occasion in that case to pass upon the time of the vesting of interest in the "heirs" who might be substituted for the children.

In *Sears v. Russell*, *supra*, the court say: "The rules of construction, that the word 'heirs' is usually construed to mean those who are such at the time of the testator's decease, and that estates created by devise are to be held to be vested rather than contingent, must give way to the controlling rule of interpretation that the intent of the testator is to govern, etc. * * * The intent of the testator in making the limitation to his heirs at law in this clause of the will, is not left in any doubt. It is expressly declared to be to prevent his son-in-law from inheriting," etc. It is apparent that it was the facts peculiar to the provisions of the will, and not the application of any rule as to the use of a word designating a class, which governed in this, as in the other cases.

The case of *Strode v. McCormick*, *supra*, is in many respects very nearly like the case under consideration. There, as here, the question arose from words used in a deed disposing of a remainder; and there, as here, the deed was made to create an intermediate life estate for the use of a divorced wife of the grantor. In that case, however, there was not, as here, any substitutional gift, and the word there

to be construed was "children." The court, in deciding that case, say :

"There is to be found in the deed no direct gift or grant to the children of the grantor. The deed simply directs the trustees that at the death of Mary B. Strode they shall sell the lot and divide its proceeds equally among the children of the grantor. When the time appointed for the sale and distribution arrived in 1878, there were only three children surviving, and these three children, and they only, were within the description of those among whom the division was to be made. No one other than a person who could, at the time of the death of Mary B. Strode, predicate of himself or herself that he or she was one of the children of James M. Strode, and issue of his marriage with Mary B. Strode, could rightfully claim anything under and by virtue of the deed. It appears from the record that the grantor in the deed was a lawyer, and therefore all the stronger is the presumption that would prevail without this circumstance that he knew full well the names of the children born of his marriage, and that when he did not name them or make any direct gift or grant to them, or either of them, either antecedent or subsequent to the direction of the trustees, but simply directed the trustees at the death of his wife, to make division of a designated fund among his 'children,' the issue of his marriage, he contemplated the contingency of a death or deaths before the time of distribution."

It seems then, that the reasoning of that case is, that while no words appear which, considered of themselves, would be absolutely indicative of survivorship, yet because the word is "children" and because the donor knew their names and readily might, and naturally would, have named them individually, and yet did not so name them, therefore he did have, and thereby expressed, an intent of survivorship and of postponement of the gift of the remainder not only until the convenience of the fund was served, by the expiration of the use of the intermediate estate, but as well until it should be determined in the course of natural events how many of the children should survive their mother, his divorced wife.

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The same reason could hardly apply here. As we have noted in the case of *Strode v. McCormick*, there was no element of substitutional gift as here. The two times of alleged vesting were there the time of the delivery of the deed and the time of the end of the intermediate estate. And in comparison with this deed they stand for the time of the death of Albert G. Hobbie (not the delivery of the deed) and the end of the intermediate estate. Strode could have named his children individually at the time of the making of the deed had he so desired. Hobbie could not, when this deed was made, have named the ones who would be his heirs at the time of his death. The failure to name individually in the case of the Strode deed is interpreted to have been a matter of choice, and to have meant something, viz., postponement in a contemplation of survivorship. The failure here to name individually was not a matter of choice, but inevitable.

It is not to be disputed that the rule has been frequently announced that when a testator or donor chooses words designating a class, and the devise or gift to them is by words of distribution *in futuro* only, it is therefrom presumed that the intent was to devise or give to such of the class only as could predicate of themselves at the period of distribution that they are then of the class. But the reason of the rule arises from the *choice* of such designation by testator or donor, who, instead of naming individually, chooses to thus indicate a contemplation of survivorship. This interpretation of the rule is supported by the decision in *Minot v. Tappan*, *supra*, where the court say, "There are no words of contingency such as 'if they shall be living at his death, or 'to such of my heirs as shall be then living,' which would naturally be used if the intention were to limit the devise or bequest to *such of the class as should be then living*." It is also supported by the language of *Kellett v. Shepard*, *supra*.

As we do not understand the cases above cited and considered, to establish any absolute rule that the use of words like the words in question, indicating a class, is conclusive of a postponement for reasons personal to the

donees, and as we find in the facts of this case and the recitals of this deed no indication that the postponement here was for any reason whatever personal to the donees, we hold that the postponement was solely for the convenience of the fund.

If in thus seeking to discover the intent of the donor as a guide to the conclusion reached, we have followed methods of construction usually applied to the construction of wills rather than of deeds, it yet remains true that in so doing we do not at all drift away from the ordinary and accepted meaning of the words in question by giving them an artificial meaning, supposed to be more consonant with the intent of the donor; but on the contrary, we are here led to the same conclusion which would be reached if the more rigid rules of construction applicable to deeds, were followed. The authorities before cited leave no ground to doubt that the established meaning of the words "his heirs" is to indicate those who are heirs at the death of the ancestor. And though the rules applied here are largely such as have been announced in and become established through decisions involving construction of wills, yet those rules may be also applied to the construction of deeds, as in *City of Peoria v. Darst*, *supra*, and *Strode v. McCormick*, *supra*.

We are of opinion, therefore, that the remainder vested upon the death of Albert G. Hobbie in such as were then his heirs at law, and that such heirs then took a present fixed right of future enjoyment, which enjoyment only was deferred thereafter until the expiration of the life estate. It follows that the interest of Lydia Harper Cone was a vested interest at the date of the execution of the release hereinbefore set forth, to wit, on April 11, 1879.

It is contended further by counsel for cross-complainant, Lydia Harper Cone, that even though her interest in the remainder of the fund had become vested at the time of the execution of the release, yet the release ought not to be held to convey that interest, because it does not appear that she, as *cestui que trust*, had full knowledge of all the facts and circumstances of the case, or knew at that time what

were her rights in the trust fund. It is complained in this connection that the Circuit Court erred in excluding evidence proffered to show the circumstances of the settlement which resulted in the executing of the release in question.

Mrs. Cone, the cross-complainant, testified that the signature to the release was her signature; but, in answer to a question as to the circumstances of signing it, stated that she had no remembrance whatever of signing it. The only testimony bearing upon the circumstances of the settlement which was excluded by the trial court, is that of the witness Charles H. Ferry, who acted as attorney for Eleanor O. Read in effecting the settlement. Mr. Whitehouse acted as attorney for the executrix and trustees of the Ogden estate. The questions to which objections were sustained were as follows:

“Q. Now, will you tell the court, at the time this settlement was made, how much was due from the Ogden estate to Mrs. Read and Mrs. Cone and Mrs. Brown, because they were all entitled to an interest therefrom for support and maintenance? In 1879, when this was settled, how much was due her interest account?

“Now, was the question discussed between you and Mrs. Read and Mr. Whitehouse as to the amount that was due on account of this fund?

“Q. Did you hear a conversation with Mr. Whitehouse and Mrs. Read as to this purport: Mr. Whitehouse wanted Mrs. Read to take a smaller sum because he said after this settlement they would have to settle with the Hobbie heirs.

“Q. What was the conversation on that subject-matter, whether the fund or the interest in the fund was settled in this negotiation about the fund itself? Just state what conversation was had between you and Mr. Whitehouse.

“Q. What, if anything, was said on the subject-matter of there being still a liability on the part of the Ogden estate to the heirs of Hobbie?

“Q. Now, there is a release here purporting to be signed by Mr. and Mrs. Read, Mrs. Cone and Mrs. Brown. You appear to have taken the acknowledgment of the parties.

Will you look at that instrument and state whether you read over that instrument to either Mrs. Cone or Mrs. Brown?

"Q. Do you know if they knew of the contents of that instrument?

"Q. Did you in that negotiation read them to Mrs. Cone or Mrs. Brown?

"Q. Now, in the settlement between you and Mrs. Read and Mr. Whitehouse for the Ogden estate, was not the amount ascertained or talked over what was due from the Ogden estate to Mrs. Read from the income of this fund?

"Q. Was it not agreed that the amount due Mrs. Read from the income of this fund was greater than the amount paid to her?"

Exceptions were taken to the rulings of the court in sustaining objections to each of these questions, but in no instance did counsel indicate to the court what it was proposed to show by answer to the questions. The rulings of the court can not, therefore, be reviewed for error. *Howard v. Tedford*, 70 Ill. App. 660; *Berkowsky v. Cahill*, page 101, this volume.

The answer given by this witness to another question would indicate that no talk was had with Mrs. Cone at that time.

"Q. Did you have no conversation with them (referring to Mrs. Cone and Mrs. Brown) about the subject-matter of the settlement—with either of them?"

"A. No."

Some testimony was excluded bearing upon the execution of the release by Mrs. Brown, which is not material here, not having been connected with the execution by Mrs. Read or Mrs. Cone.

William B. Ogden, the trustee, died in 1877, and while no definite showing is made to that effect, yet it would seem from the evidence altogether likely that the trust fund was lost by him before his death. In the argument of the case counsel for the several parties have treated it as an admitted fact that the fund had become lost through bad investments.

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The testimony of Fishburn would tend to show that the trustees under the will of Ogden never received any part of the trust estate. Upon these facts, and nothing further appearing, we are not prepared to hold that the release discharging the executrix and trustees of Ogden from liability for the trust fund, executed by cross-complainant, who was then an adult and married woman, was obtained under circumstances which invalidate it. Nothing is pleaded in this behalf, and nothing proved, which would warrant the court in so holding.

The conclusion of the court therefore is, that the word "heirs" as here used is a word of purchase, and not of limitation; that the gift was alternative or substitutional, and that upon the death of Albert G. Hobbie before the expiration of the intermediate estate the "heirs" named in the deed were substituted for him as takers of the remainder and by purchase under the deed; that the use of the word "heirs," designating a class, instead of naming donees individually, being not by choice or election of the donor, but unavoidable, because he could not at the time of making the deed know who might be his heirs at the time of his death, was therefore not such use of a word designating a class as conveyed any conclusion of a postponement for reasons personal to the donees, *i. e.*, by contemplation of survivorship; that all else in the deed, *viz.*, the use of the word "heirs," which in its common acception means heirs at the death of the ancestor, and the general purpose of the deed, which was to comply with an order of court in creating the intermediate estate, indicate that the postponement here was clearly for the convenience of the estate or fund alone; that therefore, though the gift is by words of distribution only, and not by words antecedent to the direction for distribution, yet the rule that the vesting is deferred to the period of distribution does not here apply, as the case comes under the exception of cases where the postponement is for the convenience of the estate only, and not for reasons personal to the donees; that the remainder having vested in the heirs of Albert G. Hobbie at the time of his death, the

interest of cross-complainant, Lydia Harper Cone, one of those heirs, was a vested interest at the date of the release, which was after the death of Albert G. Hobbie, and that such interest was conveyed by the terms of the release; that under the facts and circumstances of this case, so far as disclosed by the evidence, no sufficient reason appears for holding the release to have been unconscionable even as between personal representatives of a deceased trustee and a *cestui que trust*.

The bill and cross-bill were therefore without equity, and were properly dismissed.

The decree is affirmed.

72	264
s99	601
99	605
72	264
s206s	51

Robert Cameron v. Christopher B. Bouton and James G. Wright.

1. **ESTOPPEL**—*To Deny Indebtedness*.—When a person makes his promissory note payable to his own order, indorses the same and delivers it to another person and gives to such other person full authority in writing to pledge such note, which is done, he will be estopped from denying such authority or that he owed the full amount of the note.

2. **MORTGAGES**—*What an Assignee Takes*.—The assignee of a mortgage takes it subject to any defense which the mortgagor would have against it in the hands of the mortgagee or assignor.

Mortgage Foreclosure.—Error to the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Heard in this court at the October term, 1897. Reversed in part and remanded. Opinion filed December 16, 1897.

MATZ & FISHER, attorneys for plaintiff in error; **GEORGE W. SMITH**, of counsel.

The law is well settled in this State that when resort is had to a court of equity to foreclose a mortgage or trust deed, that court will let in any defense against the assignee of the mortgage which would have been good against the mortgage in the hands of the mortgagee himself, and this regardless of the fact that the assignee may have purchased

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the note and mortgage in good faith and before their maturity. *Kleeman v. Frisbie et al.*, 63 Ill. 482; *Haskell v. Brown*, 65 Ill. 37; *Petillon v. Noble*, 73 Ill. 567; *Towner v. McClelland*, 110 Ill. 542; *Himrod v. Gilman*, 147 Ill. 293; *Humble v. Curtis*, 160 Ill. 193; *McCormick v. Buehler*, 67 Ill. App. 73; *McAuliffe v. Reuter*, 166 Ill. 491.

HECKMAN & ELSDON, attorneys for defendant in error Christopher B. Bouton.

Gehr was constituted by the Camerons their agent for the disposition of the note and trust deed in question without limitation as to his authority when the note and trust deed were made and placed in his hands. They are bound by his acts. *Silverman v. Bullock*, 98 Ill. 11; *Otis v. Gardner*, 105 Ill. 436; *Broom's Legal Maxims*, 715; 2 *Pomeroy*, *Equity Jurisprudence*, Sec. 710.

LEE & HAY, attorneys for defendant in error James G. Wright; WILLIAM BROWN, of counsel.

An assignment of a portion of a chose in action will be protected in equity. The legal holder will become a trustee for the benefit of the assignee of the portion. *Pomeroy v. Manhattan Life Ins. Co.*, 40 Ill. 398; *Gillett v. Hickling*, 16 Ill. App. 392; *Phillips v. Edsall*, 127 Ill. 547; *Hutchinson v. Simon*, 57 Miss. 628; *Story's Equity Jurisprudence*, Sec. 1044.

MR. PRESIDING JUSTICE ADAMS DELIVERED THE OPINION OF THE COURT.

The defendant in error Bouton, being the legal holder for value of a promissory note made by Arthur C. Gehr for the sum of \$5,000, and holding, as collateral security for the payment thereof, a promissory note for the sum of \$11,000, executed by the plaintiff in error, Robert Cameron, payable to his own order and indorsed in blank, and secured by a trust deed of real property executed by said Cameron and Sarah McC. F. Cameron, his wife, all of which instruments are hereinafter described, filed a bill for the foreclosure of said trust deed, setting up the said instru-

ments and also two certain writings dated, respectively, May 3d and July 27th, 1893, which will be more particularly referred to hereafter, alleging that the defendant in error James G. Wright claimed some interest in the Cameron note, making Wright Cameron and wife and others, defendants, and praying as is usual in such cases. The defendants answered, and defendant in error Wright filed a cross-bill in which he set up a promissory note for the sum of \$7,700 executed to him by Arthur C. Gehr, and a certain assignment from Gehr to him of his, Gehr's, interest in the Cameron note and trust deed, subject to the rights of defendant in error Bouton, who, at the time of the assignment to Wright, held the note and trust deed as collateral security, as aforesaid. Answers were filed to the bill and cross-bill and replications to the answers. It is unnecessary to state the pleadings more in detail, as it was not objected on the hearing that any evidence was introduced which was inadmissible under the pleadings, or that there was any variance between the allegations and the proofs. The cause was heard on the pleadings and the testimony of witnesses examined and documents produced in open court.

There were two pieces of property described in the trust deed, of which one belonged to Robert Cameron and the other to his wife, Sarah McC. F. Cameron, and the court, by its decree, dismissed the cause as to the property of Mrs. Cameron for reasons stated in the decree. The court found that there was due to defendant in error Bouton the sum of \$6,022.78, and that there was due to the defendant in error Wright the sum of \$2,047.50; that Bouton's was the prior lien, and that Wright was entitled to recover, to the extent of his debt, the balance found to be due upon the Cameron note after and subject to the amount found to be due to Bouton.

The court further found that there was due from plaintiff in error Robert Cameron, on his said note, the sum of \$12,996.82, and entered a decree in accordance with these findings, and for the sale of the premises of plaintiff in error described in the trust deed, etc.

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The following are uncontroverted facts in the case:

The plaintiff in error executed a promissory note of date April 1, 1893, payable to his own order, and due in one year after the date thereof, for the sum of \$11,000, with interest at the rate of six per cent per annum, payable half yearly, principal and interest payable in gold coin of the United States, at the office of Arthur C. Gehr & Co., and indorsed said note in blank, and delivered it to Arthur C. Gehr. It is recited in the note that it is secured by trust deed on real estate in Cook county, Illinois. Attached to the note were interest coupons. To secure payment of the note, Robert Cameron and Sarah McC. F. Cameron, his wife, executed to Arthur C. Gehr a trust deed of the same date as the note, conveying certain real property in Cook county, Illinois, described as lot 4 in Lawrence Proudfoot subdivision, etc., and lot 6, etc., in Wrightwood, which trust deed was acknowledged by Cameron and wife, and was recorded in the office of the recorder of deeds of Cook county April 5, 1893.

Subsequently, and on the day of its date, the Camerons signed and delivered to Arthur C. Gehr a paper, of which the following is a copy:

“CHICAGO, May 3d, 1893.

ARTHUR C. GEHR, 114 Dearborn St.

You are hereby authorized to borrow such an amount upon my note for \$11,000, dated April 1, 1893, secured by a deed of trust, as you may require. The said note was deposited with you to secure you from loss by reason of your having signed a contract for the purchase of the property on Barry avenue, for my benefit. I have received the sum of \$1,000 on account of said note, and in giving you my consent to raising additional amounts on said note, I rely upon you to see that such amounts are paid promptly, though legally I authorize you to use said note for your benefit and accommodation, at its face value at your discretion.

ROBERT CAMERON.

SARAH F. CAMERON.”

After receiving this paper, and about May 20, 1893, Arthur C. Gehr borrowed from Frederick W. Straus, on his, Gehr's,

sixty day note, the sum of \$6,000, pledging the Cameron note and trust deed as collateral security. July 19, 1893, Gehr, being unable to meet his note at maturity, applied to Straus for an extension of his note, which Straus refused to grant, unless he, Gehr, should bring Mr. Cameron, and that Cameron would make a satisfactory statement in reference to the note and trust deed. Gehr then sent for Mr. Cameron, who came and signed a paper, of which the following is a copy :

“ CHICAGO, July 27th, 1893.

I, the undersigned, Robert Cameron, do hereby declare that I did, on the first day of April, 1893, execute one promissory note, payable one year after date, to the order of myself and by me indorsed in the principal sum of \$11,000, with interest thereon at the rate of six per cent. per annum, payable half yearly, on the first day of October and of April in each year, without grace, at the office of Arthur C. Gehr & Company, in Chicago, interest evidenced by two coupon notes of even date; that the said sum of \$11,000 was paid me by Arthur C. Gehr & Company, and that said Arthur C. Gehr & Company, upon the execution thereof, became the owner of said notes and coupons and had full authority to negotiate or otherwise dispose of the same for their own use and benefit.

Said note and interest aforementioned is secured by trust deed, executed by me, on real estate in Cook county, which said trust deed bears document number 1,843,226, recorded April 5, 1893, in book 4289 of records, page 36.

ROBERT CAMERON.

Signed in presence of :

B. J. WERTHEIMER,

F. W. STRAUS.”

Gehr's note was then extended by Straus, and was paid in full in about thirty days from that time.

August 17, 1893, Arthur C. Gehr borrowed from Christopher B. Bouton \$5,000 on the note of Arthur C. Gehr & Co., of date August 17, 1893, for the sum of \$5,000 in gold coin of the United States, with interest at seven per cent per annum,

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payable annually after maturity, the note being payable to the order of the makers and indorsed by them.

After the signature to the note is a recital, signed as is the note, to the effect that the Cameron note and trust deed are transferred and assigned to the legal holder of the note of Arthur C. Gehr & Co., as collateral security. The note and trust deed were delivered to Bouton. Arthur C. Gehr received the amount of \$5,000 on the note secured as stated, from money belonging to Christopher B. Bouton, and used \$3,000 of it in paying his note to Straus. Arthur C. Gehr did business under the name of Arthur C. Gehr & Co. He was Arthur C. Gehr & Co.

The Cameron note and trust deed were originally given under these circumstances: Plaintiff in error was desirous of purchasing a piece of property on Barry avenue in the city of Chicago, which belonged to the minor heirs of one Bruschke, deceased, and had been negotiating with the administrator of the estate and the guardian of the minors for the purchase.

Arthur C. Gehr's deceased father had been, and he was, the confidential adviser of the Camerons, and to him Robert Cameron applied for advice in relation to the matter. The property was incumbered for \$5,000 by mortgage, and Cameron was willing to pay \$10,000 for the property, being \$5,000 for the equity belonging to the estate. Gehr advised him that he could not procure the title from the administrator and guardian, and that the better way would be to have a foreclosure and sale, and that by purchasing at the sale, the title could be procured after the lapse of fifteen months from the sale in the event of non-redemption, and it was arranged that Gehr should bid in the property for him at the sale. Gehr attended the foreclosure sale about March 2, 1893, purchased the property for about \$5,000 in his own name, and March 3, 1893, a certificate of sale was issued in his own name, which he received about two weeks later, and sold and assigned absolutely, to J. G. Wright. Subsequently and about April 5, 1893, the Cameron note and trust deed were executed.

March 2, 1893, Gehr made an agreement in writing with Charles Kriewitz, guardian of Louis and Eoenia Bruschke, minors, in which, after reciting the decree of sale and the sale of lots 29 and 30 in Oak Grove addition to Chicago (being the Barry avenue property), and that he had bid at said sale the sum of \$10,000, the same being the highest and best bid, he, Gehr, agreed that he would pay the sum found due by the master and costs and expenses of sale, being \$4,918.43, to the master on receipt of the certificate of sale, the balance to be paid in cash on or before the day of expiration of the time of redemption, if the property should not be redeemed, and on the further condition that the agreement should not impair or affect in any manner the lien or rights of the legal holder of the certificate. It was further agreed that Gehr should pay into the Circuit Court \$5,081.57, being the balance of said \$10,000, less the interest on \$4,918.43, at the rate of six per cent per annum, and less, also, such other sums as he might find necessary to pay for taxes for the years 1892 and 1893, and for insurance against fire. This agreement was signed by Gehr and Kriewitz. Following the signatures to the agreement, and dated May 2, 1893, which was six weeks after the assignment of the certificate of purchase to Wright, is the following:

"For value received I hereby sell, assign, transfer and set over to Robert Cameron, Chicago, Illinois, all my right, title and interest in and to the within contract for sale, and for myself, my heirs, executors, administrators and assigns, I agree that upon the delivery of the within master's deed, I will convey said land to Robert Cameron, who has delivered to me his note for \$11,000 secured by trust deed upon land in Cook county.

Chicago, May 2, 1893.

ARTHUR C. GEHR. [SEAL.]"

The Cameron note and trust deed were made to secure Gehr against loss by reason of his undertaking to purchase and procure title to the Barry avenue property.

March 16, 1894, Gehr borrowed from James G. Wright \$7,700, and as evidence of his indebtedness, executed to

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Wright a promissory note of that date, for the sum of \$7,000, due March 17, 1894, with interest at the rate of seven per cent per annum, and payable to the order of James G. Wright, accompanied with a power of attorney to confess judgment. At the same time, to secure payment of the note, he assigned and transferred to Wright by a written instrument under his hand and seal his, Gehr's, interest in certain property. The assignment, after reciting other interests, concludes as follows:

"Also all right, title and interest in and to a certain note for the sum of eleven thousand dollars (\$11,000), made by Robert Cameron and dated April 1, 1893, secured by a deed of trust recorded in the recorder's office of Cook county, Illinois, in book 4289 of records, at page 36, subject to an incumbrance or loan upon said note of the sum of five thousand dollars (\$5,000), for which said note is pledged with Walter Tod & Co., of Chicago, Illinois.

Witness my hand and seal this 16th day of March, A. D. 1893.

ARTHUR C. GEHR. [SEAL.]"

Tod & Co. acted as the agents of defendant in error, Christopher B. Bouton, in making the loan, and held the Cameron note and trust deed as Bouton's agents, and about April 19, 1894, a note of which the following is a copy, was delivered to them:

"CHICAGO, April 19, 1894.

To Messrs. WALTER TOD & Co., City.

Gentlemen: We have assigned to James G. Wright our equity in the \$11,000 note of Robert Cameron held by you as collateral to our note for \$5,000. Will you please hold the same to his order subject to our debt, and oblige.

Very truly yours,

ARTHUR C. GEHR & Co."

Gehr obtained from Wright the money which he paid on the delivery to him of the certificate of purchase of the Barry avenue property, and the sale and assignment of the certificate to Wright. Gehr never did anything in pursuance of his undertaking to procure the title to the property

for Mr. Cameron, nor was he put to any expense whatever, nor did he suffer any loss by reason of that undertaking, so far as appears from the evidence.

By written instruments of date, respectively, November 4, 1893, and June 23, 1894, Gehr assigned to plaintiff in error, Cameron, certain interests in option contracts of doubtful value. These assignments were subsequent to the loan from Bouton, and were made to secure Cameron against loss, by reason of his note and trust deed having been pledged as collateral security for the Bouton loan. About the middle of April, 1893, Gehr, by the request of Cameron and wife, loaned them \$1,000 on the security of the Cameron note and trust deed. Cameron paid back \$300 July 29, 1893, prior to the Bouton loan, and \$600 after the Bouton loan was made, leaving unpaid only \$100.

Upon the hypothesis, which is at least doubtful, that a court of equity would, under the circumstances disclosed by the evidence, lend Gehr any aid whatever, on a bill filed by him to foreclose the Cameron trust deed, he could only obtain a decree for the unpaid money advanced by him, with interest. Such being the case, the solicitors or plaintiff in error rely on the rule announced in *Old v. Cummings*, 31 Ill. 188, and approved in a number of subsequent cases, that the assignee of a mortgage takes it subject to any defense which the mortgagor would have against it in the hands of the mortgagee or assignor. That this rule, first announced in *Old v. Cummings*, and approved and adhered to in a long line of subsequent decisions, is the thoroughly settled law of this State, does not admit of doubt or controversy. The solicitors of defendants in error do not contend the contrary. Their contention is that the rule has no application to the facts in this case.

There was a conflict in the evidence as to whether Gehr had a general authority from the Camerons, or either of them, to negotiate the Cameron note. The relation which existed between Gehr and the Camerons was testified to by Gehr, as follows: "I have known Mrs. Cameron since the spring of 1883. My relations with her family have always

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been extremely pleasant. I did considerable business for her and her family. Prior to my father's death he had been the adviser of the family for a great many years. He was their confidential adviser on a great many business matters; after his death I continued to occupy the same relations with them. I kept their papers in my vault, at their convenience—the abstract and a good many of the papers they had relating to land.” In respect to the writing of May 3, 1893, Mr. Cameron testified that in May, 1893, Gehr said to him: “Mr. Cameron I want to ask you for a little favor this morning. I says, ‘Mr. Gehr, if I can do you a little favor I will do it.’ So at that time my wife came out just as he asked me, and she heard the conversation with Mr. Gehr and me. The favor he wanted was to use the notes for \$1,500 for ninety days, and my wife spoke up and she said, ‘We owe Mr. Gehr \$1,000 now;’ and she certainly thought Mr. Gehr was all right for to let him use the notes for ninety days for \$1,500.” The witness says that Gehr then drew up the May 3d paper, and they, Cameron and his wife, signed it; that Gehr said it was a paper to give to the people who were going to loan him \$1,500, to show that he had authority to use it for that amount.

Mrs. Cameron testified substantially as did her husband. She testified: “I did not read the paper. Mr. Arthur Gehr drew it up. He asked me to get him a paper and pen and ink and he wrote it, and he said, ‘I want you and Mr. Cameron to sign this paper so I can get that \$1,500.’”

Gehr denies this testimony of these witnesses, saying, “I did not tell Mr. and Mrs. Cameron that I wanted to raise \$1,500.” He also testified that nothing was said about the amount he would be limited to borrow on the notes. The evidence with regard to the July 27th writing, tends strongly to show that it was given solely for the purpose of enabling Gehr to have his note to Straus extended for thirty days.

May 20, 1893, Straus loaned Gehr \$6,000 on Gehr's note for sixty days, taking the Cameron note and trust deed as security. July 19, 1893, Gehr called on Straus and informed him that he could not meet his note, that he only had \$2,000,

and asked for an extension, which Straus refused to grant, unless he could see Cameron and satisfy himself as to the collateral security. Cameron was sent for accordingly, and the reason for his being sent for was, as Straus and Wertheimer testify, fully explained to him. When the paper was prepared and he was requested to sign it, he took it to his confidential adviser, Mr. Gehr, who was present. Cameron testified as follows: "I took the paper in my hand and went over to Mr. Gehr, and asked him what the paper meant. He told me 'I am going to get the money from Mr. Straus, and he don't like the looks of the paper your wife and you signed at the house, and wants you to sign this one.' I said to Mr. Gehr, 'Is it all safe for me to sign this?' 'Perfectly safe, Mr. Cameron,' he says, 'just the same as you and your wife signed at the house.'" He further testified, "Mr. Gehr knew that I could not read." Gehr himself testified that in the years 1892 and 1893 he understood Mr. Cameron could not read.

It appeared from the evidence of the Camerons that all the consideration ever received by them from Gehr for the Cameron note was \$1,000, and they produced receipts showing that \$900 of that amount had been paid to Gehr. Gehr did not deny this.

The foregoing evidence bore upon the question of the extent of Gehr's authority to negotiate the Cameron note, and on the amount due on the note, and would, on a bill filed by Gehr, the grantee in the trust deed, for foreclosure, be entitled to consideration by the court in connection with the other evidence. It would be, in such case, competent evidence, and could not properly be excluded. What weight should be given to it, would, of course, be for the court to decide.

It is evident, from the findings of the court contained in the decree, that the court excluded from consideration the testimony of the Camerons above referred to. The decree, after reciting the writings of May 3 and July 27, 1893, proceeds as follows:

"And the court further finds that the said defendants,

Robert Cameron and Sarah McC. F. Cameron, are estopped to deny that the said defendant Arthur C. Gehr, had full authority to pledge said principal note of the said Robert Cameron, and the said interest note or coupon accompanying the same, and the said trust deed securing the same to the complainant, for the full amount borrowed by the said defendant Arthur C. Gehr from the complainant therein, as aforesaid."

The finding, in another part of the decree, is as follows: "And the court finds that, by reason of the said writings so made and given to said Gehr by said Camerons, the said Robert Cameron and Sarah McC. F. Cameron are estopped from asserting that the said Robert Cameron does not owe the amount of said note of \$11,000 of said Robert Cameron and the interest thereon, according to the provisions of said note and trust deed." These findings are conclusive that the court held, as matter of law, that the Camerons were estopped by the writings of May 3 and July 27, 1893, to deny that Gehr had authority to pledge the note for the full amount borrowed by Gehr from Bouton, and were also estopped to deny that Robert Cameron owed the full amount of the note, namely, \$11,000 and interest.

It can not be contended that in defense of a bill for foreclosure of the trust deed by Gehr, the Camerons would be so estopped. How, then, can the writings of May 3d and July 27th estop them as to the defendant in error Bouton? The evidence is conclusive that neither Bouton nor his agent, Tod, who made the loan to Gehr for him, knew of either of those writings until after the loan was made.

The following occurred in the examination of the defendant in error Gehr, who was called as a witness by cross-complainant Wright:

Q. "Did you say anything to Mr. Tod, at all, about this paper, July 27, 1893, signed by Robert Cameron, which has been offered in evidence?"

A. "Not beyond—except that I had authority to use that note."

Q. "What do you mean by saying 'not beyond?' Did you mention that paper?"

A. "Well, I did not—I did not attempt, for instance—he read what was there."

Q. "Well, did you give him the paper?"

A. "I gave it to him when I took back the note and trust deed from Mr. Straus' office."

Q. "You took that paper with the \$11,000 note and mortgage after you had given your check to Mr. Straus, and had obtained them from him, to Mr. Tod?"

A. "Yes, sir."

Q. "That is it, isn't it?"

A. "Yes, sir."

Q. "That is, before that time, Mr. Tod had given you the check, which you had had certified and deposited in your own bank to your own credit, about an hour before?"

A. "Yes, sir."

Q. "That is right?"

A. "Yes, sir."

Q. "So that when you went to Mr. Straus, and before you delivered either the \$11,000 note, or the trust deed, or the paper signed by Robert Cameron, the money was in your bank to your credit?"

A. "Yes, sir."

Bouton testified that he had no conversation with Gehr before the loan was made. The witness Tod, who made the loan for Bouton, testified that he received the July paper from Gehr at the same time he received the note and trust deed, and the evidence is clear that he did not receive and could not have received the note and trust deed until after Gehr received the money and paid Straus, the note and trust deed having been deposited with Straus as security for his loan to Gehr.

Among the numerous findings in the decree in favor of the defendants in error, Bouton and Wright, there is no finding that Bouton knew of the existence of the paper of July 27th. With regard to the writing of May 3, 1893, there is not a particle of evidence that either Bouton or his agent, Tod, ever knew of it. Gehr never seems to have used it. He says that, when he obtained it, he filed it away in

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his vault with his other papers and never referred to it until he dug it out in the summer of 1894. Bouton and his agent, Tod, being ignorant of the writings of May 3d and July 27th at the time the loan was made, could not have been influenced by those writings in making the loan, and therefore the Camerons are no more estopped by reason of those writings as against the defendant in error Bouton than they would be if Gehr was the complainant in the bill.

In the recent case of *McAulliffe v. Reuter*, it was held that on a bill filed to foreclose a trust deed given to secure payment of a promissory note for \$1,000, indorsed in blank to the complainant before maturity, the grantor in the deed might prove a private verbal arrangement between himself and the payee of the note, of which the complainant had no knowledge, that he, the maker, might pay the note in small installments as he might be able, and that in accordance with such arrangement, he had paid to the payee, the complainant's assignor, the whole of the principal and interest except thirty dollars, some of the payments having been made after the assignment of the note to the complainant, and without notice to the maker of the note of the assignment.

The Circuit Court having ruled it to be the law that the Camerons were estopped by the writings of May 3 and July 27, 1893, to deny that Gehr had authority to pledge the Cameron note for the full amount of the loan, and were also estopped to deny that Robert Cameron owed the full amount of that note, it must be presumed that the court did not weigh, or even consider, as affecting the case, the testimony of the Camerons, which tended to show that Gehr had not such authority and that Robert Cameron did not owe that amount. To presume otherwise would be to presume that the judge of the Circuit Court acted contrary to what he solemnly adjudged to be the law.

We are of opinion that the Camerons were not estopped by the writings in question from proving, if they could, what Gehr's actual authority was, or from proving that

Robert Cameron did not owe the full amount of the note, and that the exclusion from consideration of their evidence was erroneous.

The assignment to Wright of Gehr's interest in the note, subject to the prior assignment to Bouton, was, as heretofore stated, by a separate instrument, of date March 16, 1894, and was not such an assignment as is contemplated by Sec. 4, Chap. 98 of the Statutes, namely, by indorsement of the note. The assignment, therefore, was merely equitable, and Wright, the equitable assignee, took subject to any defense which Robert Cameron, the maker of the note, might have against Gehr. *Osgood's Adm'rs v. Artt*, 17 Fed. Rep. 575; *Peck v. Bligh*, 37 Ill. 317.

In the last case the court say: "The only assignment which will cut off the equities of the maker of the note, is an assignment made in conformity with the statute." *Ib.* 330; *Haskell v. Brown et al.*, 65 Ill. 29.

In this case the note and mortgage were appended to the instrument which purported to assign the note, in which particular the case was stronger for the complainant than is the present case for cross-complainant Wright.

In *Melendy et al. v. Keen*, 89 Ill. 395, in which a bond issued by a railroad company purported, in terms, to assign the note secured by a mortgage which the complainant sought to foreclose, the court say: "The mortgage itself was never, in fact, assigned other than by what is contained in the railroad company's bond to which it was attached, except by delivery, which, at most, is only an equitable assignment and bars no equities existing between the original parties."

If Wright, as is contended by his solicitors, had knowledge of and relied on the papers of May 3d and July 27th, before and at the time of making the loan to Gehr, this can not avail him, because the utmost that can be claimed for those papers is, that they purported to authorize an assignment by Gehr; but in Wright's case there was no assignment effective to cut off equities as between the original parties to the note and trust deed. What has been

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said in respect to the finding of the Circuit Court that, as matter of law, the Camerons were estopped, as heretofore stated, and the consequences of such finding, is as applicable to Wright, the cross-complainant, as to Bouton, the original complainant.

Defendant in error Bouton has assigned as cross-error the dismissal of the bill as against the property of Sarah McC. F. Cameron, described in the decree as follows:

Lot number six (6) in the subdivision of lots number seven (7), eight (8), nine (9) and ten (10), in block number eleven (11) in Wrightwood, said Wrightwood being a subdivision of the southwest quarter (S. W. $\frac{1}{4}$) of section number twenty-eight (28), in township number forty (40) north, range number fourteen (14), east of the third principal meridian, in the county of Cook and State of Illinois. Mrs. Cameron is not a party to the writ of error, either by service or appearance. The *scire facias* sued out by plaintiff in error runs only to the defendants in error Bouton and Wright. The court can not, therefore, adjudicate Mrs. Cameron's rights in the premises.

The decree will be reversed, except that part thereof dismissing the cause as to the property of Sarah McC. F. Cameron, heretofore described, which part of the decree is neither reversed nor affirmed, and the cause is remanded for rehearing. Reversed in part and remanded.

Albert D. Major v. William H. Rand.

1. **COURTS—Motions to Vacate Judgments.**—The power of the court over its judgments, while confined by the rules of law and by the terms of the statute, to the term at which they are rendered, is yet extended to a subsequent term when a motion to vacate is entered at the judgment term and continued to the subsequent term.

2. **SAME—Rules of the Circuit Court of Cook County Construed—Notice.**—Rules 11 and 12 of the Circuit Court of Cook County provide as follows: "No motion will be heard or order made in any cause without notice to the opposite party, when an appearance of such party

has been entered, except where a party is in default or when a cause is reached on the call of the calendar. Notice to the opposite party must be in writing, state the motion, designate the judge before whom the same is to be made, and the place of hearing, and be served by delivering a copy to such party or his attorney of record before 4 P. M. of the day preceding the day." This applies to the final disposing of and not to the mere filing or entry of such motion.

3. *SAME—Vacating Judgments Discretionary.*—The action of the trial court, in ruling upon a motion to vacate a judgment by default, is a matter of discretion, and will not be interfered with except when it clearly appears that the discretion has been abused.

Motion to Vacate Judgment.—Error to the Circuit Court of Cook County; the Hon. ABNER SMITH, Judge, presiding. Heard in this court at the October term, 1897. Affirmed. Opinion filed December 16, 1897.

RINAKER, AYERS & RINAKER, attorneys for plaintiff in error.

Even if the trial court had jurisdiction (which we deny) a judgment by default can be vacated only by a motion therefor, interposed in due time and supported by affidavits, setting out facts showing a meritorious defense and a reasonable excuse for not having made that defense in due time. *Union Hide and Leather Co. v. Woodley*, 75 Ill. 435; *Hitchcock v. Herzer*, 90 Ill. 543; *Mendell v. Kimball et al.*, 85 Ill. 583; *Schultz v. Meiselbar*, 144 Ill. 26; *Gallagher et al. v. The People*, 91 Ill. 590; *Andrews v. Campbell*, 94 Ill. 577; *Constantine v. Wells*, 83 Ill. 192; *City of East St. Louis v. Thomas*, 102 Ill. 453; *Telford v. Brinkerhoff*, 163 Ill. 439.

RICH & STONE and LEON L. LOEHR, attorneys for defendant in error, contended that every intendment will be indulged in favor and support of the orders and judgments of courts of general jurisdiction when they depend upon the existence of matters of fact, unless their existence is affirmatively denied by the record or bill of exceptions. *Iglehart v. Pitcher*, 17 Ill. 307; *Rich v. Hathaway*, 18 Ill. 548; *Baldwin v. McClelland*, 50 Ill. App. 645.

Every court is the best interpreter of the true intent and meaning of, and the proper construction to be placed upon,

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its own special rules of practice; and it would require a *clear and strong* case of a violation, or disregard, or misconstruction by the court below of its own rules to justify the interference of an appellate court. *Stanton v. Kinsey*, 151 Ill. 301.

Courts during the same term have unlimited control of their orders and judgments, to modify, amend or set them aside; and if set aside, error can not be assigned. *Freeman on Judgments*, Sec. 90; *Black on Judgments*, Sec. 305; *Frink v. King*, 3 Scam. 144; *Stahl v. Webster*, 11 Ill. 511; *Coughran v. Gutcheus*, 18 Ill. 390; *Bolton v. McKinley*, 22 Ill. 203; *Stanton v. Kinsey*, 151 Ill. 301; *Fergus v. Garden City P. M. & L. Mfg. Co.*, 71 Ill. 51.

A motion to vacate a judgment entered during the term may be continued to a subsequent term and then determined; and an order vacating the judgment entered upon the hearing of such motion "stands upon the same footing as if it had been entered during the term at which the judgment was rendered." *Atchison, T. & S. F. R. R. Co. v. Elder*, 149 Ill. 173; *Windett v. Hamilton*, 52 Ill. 180; *Hibbard v. Mueller*, 86 Ill. 256; *People ex rel. v. Springer*, 106 Ill. 542.

A motion to set aside a default is addressed to the discretion of the trial court; and its decision will not be disturbed by an appellate court unless there has been a *gross abuse* of that discretion *in refusing to set aside the default*. *Hinckley v. Dean*, 104 Ill. 630; *Peoria & R. I. R. R. Co. v. Mitchell*, 74 Ill. 394; *Smith v. Grapple*, 17 Brad. 595; *Powell v. Clement*, 78 Ill. 20.

MR. JUSTICE SEARS DELIVERED THE OPINION OF THE COURT.

This is a writ of error, prosecuted by plaintiff in error from a judgment of the Circuit Court of Cook County, dismissing the suit of plaintiff in error against defendant in error, for want of prosecution.

The action was in trespass on the case, and was begun against defendant in error and one Crepin. On January 16, 1897, Rand, defendant in error, was defaulted for want of plea, suit was dismissed as to Crepin, and damages were

assessed by a jury as to Rand. On February 11, 1897, judgment was rendered upon this verdict. At the same term, on February 13, 1897, a motion by Rand was entered to set aside this judgment, and the motion was continued to the next term of the court. No notice was given to plaintiff in error or his attorney of the entering of the motion or of the order continuing the same.

At the succeeding term of court the motion to vacate was argued, both parties were represented by counsel, affidavits were presented on behalf of the motion, and upon hearing the court set aside and vacated the verdict and judgment, and leave was given defendant Rand to plead.

The cause was afterward reached upon call of the trial calendar, dismissed for want of prosecution upon motion of defendant Rand, and a judgment for costs entered against plaintiff Major.

No complaint is made of the order dismissing the cause for want of prosecution and the judgment thereon, except that because (it is claimed) the order vacating the prior default judgment was void, therefore the later order dismissing the suit was inoperative.

The only question which is here presented, therefore, is as to the correctness of the order vacating the judgment.

There is no question as to the power of the trial court, by well established rule of law as well as by the provisions of section 40 of our practice act, to vacate its judgment at any time within the term at which it is rendered. But it is contended that the order vacating, having been entered after the term, the court had then lost jurisdiction, and this, although a motion to vacate was entered at the judgment term and continued to the subsequent term, because such motion was entered and continued without notice to plaintiff in error.

The power of the court over its judgment, while confined, by the rule of law and by the terms of our statute, to the term at which it is rendered, is yet extended to a subsequent term when a motion to vacate is entered at the judgment term and continued to the subsequent term. Windett

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v. Hamilton, 52 Ill. 180, followed in Hibbard v. Mueller, 86 Ill. 256, overruling National Ins. Co. v. Chamber of Com., 69 Ill. 22; The People v. Springer, 106 Ill. 542.

It is contended, however, that plaintiff in error was entitled, under a rule of the Circuit Court, to have notice of the entering of such motion and of the continuance of the same, and that for lack of such notice the orders were ineffective to carry the motion over the term and retain the court's jurisdiction.

We think that this contention can not be maintained.

The rule relied upon is as follows :

"No motion will be heard or order made in any cause without notice to the opposite party when an appearance of such party has been entered, except where a party is in default or when a cause is reached on the call of the calendar. Notice to the opposite party must be in writing, state the motion, designate the judge before whom the same is to be made, and the place of hearing, and be served by delivering a copy to such party or his attorney of record before 4 p. m. of the day preceding the day mentioned in the notice," etc.

The Circuit Court evidently held, and we think rightly, that it is the *disposing* of the motion, not its mere filing or entry, which the rule contemplates when it requires notice. Nor is the continuing of the motion over the term an order which could only be operative upon notice to the parties. When the motion is entered upon the last day of the term, as here, its continuance might be matter of necessity or convenience to the court, and might be ordered by the court *sua sponte*, and for its own convenience. When the motion to vacate was finally disposed of, notice thereof had been given, and all parties were in court and were given hearing.

"It would require a clear and strong case of a violation, or disregard, or misconstruction by the court below, of its own special rules of practice, to justify this court in a conclusion that it understood the full scope and meaning of such rules better than the court that promulgated them." Stanton v. Kinsey, 151 Ill. 301.

We conclude, therefore, that the motion to vacate the

judgment was properly entered and continued to the following term, and that the court had not lost jurisdiction at the time of the order vacating.

But it is also contended that the vacating order was erroneous, as based upon an insufficient showing, and that it should be reviewed in that behalf and reversed.

The action of the trial court in ruling upon a motion to vacate a judgment by default, is a matter of discretion.

By the earlier cases in this State it was held that such discretion would not be reviewed upon a writ of error or appeal. *Wallace v. Jerome*, 1 Scam. 524; *Woodruff v. Tyler*, 5 Gilm. 457; *Mitchell v. City of Chicago*, 40 Ill. 174.

Later cases modified the rule, holding that when in the exercise of its discretion the court refused to grant the motion to vacate, such action was subject to review; but holding still that when the motion to vacate was granted, no appeal or writ of error would lie.

In *Bolton v. McKinley*, 22 Ill. 203, it was distinctly stated that the setting aside of a judgment by default is discretionary, and not subject to review on writ of error or appeal. This case is made the authority by Mr. Freeman, in his treatise on judgments, for the announcement of the rule that "while the right to have a judgment set aside upon sufficient showing is secured to the applicant by the granting of an appeal in case of a denial of the right, the party whose judgment is vacated before the lapse of the term has no remedy. The action of the court in granting a motion to set aside a judgment is discretionary, and not to be reviewed in any appellate court." Freeman on Judgments, 2d Ed., Sec. 90.

In cases still later it is intimated that when the trial court grants the motion to vacate, though no question of jurisdiction arises, its action as a matter of discretion may yet be reviewed. These were necessarily cases where the suit had proceeded to a final judgment after the vacating order. *Combs v. Steele*, 80 Ill. 101; *Wright v. Griffey*, 146 Ill. 394.

But the decisions are uniform in holding that when the

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discretion of the trial court in ruling upon motions to vacate judgments by default is reviewed at all, it will not be interfered with except when it clearly appears that the discretion has been abused. *Scales v. Labar*, 51 Ill. 232; *Peoria & R. I. Ry. Co. v. Mitchell*, 74 Ill. 394; *Union H. & L. Co. v. Woodley*, 75 Ill. 435; *Schroer v. Wessell*, 89 Ill. 113; *Hall v. First Natl. Bank*, 133 Ill. 234.

Upon the motion to vacate Rand undertook to show by affidavits that he had a meritorious defense, and that he had not been negligent in failing to interpose the same before default was taken.

Plaintiff had declared upon alleged false and fraudulent representations by defendants that they had authority, as officers of the corporation, to contract for sale of certain chattels, the property of the corporation. The making of these alleged false representations was of the very gist of the action. Rand presented his affidavit, wherein he avers as follows: "Affiant further says that he never personally made, or authorized any one else to make, any representations of any kind to said plaintiff, as to the authority, either of himself or said Crepin, to sell or agree to sell the property mentioned in said declaration, or amended declaration, either as individuals or as officers of said corporation."

The affidavit discloses a meritorious defense to the action.

The affidavits of Rand and Crepin show that Crepin, who was made co-defendant with Rand, informed Rand that he, Crepin, had engaged counsel to attend to the case, and to interpose defense.

The affidavit of Rich shows that he understood that his firm were retained to appear for Crepin only.

In the demurrer to the original declaration, the firm of attorneys of which Rich was a member, pleaded for both defendants, Crepin and Rand; but upon rule on defendants to plead to the amended declaration, they filed a demurrer for Crepin only.

Upon this showing the trial court held that Rand, who had disclosed by affidavit a meritorious defense to the suit,

was not precluded by negligence from interposing that defense, and hence granted the motion to vacate.

Had the court denied the motion, we are not prepared to say that we would interfere with its ruling; but treating the action of the court as a matter of discretion, we can not say that there appears any such clear abuse of discretion as would warrant interference upon review.

The judgment is affirmed.

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People of the State of Illinois v. Louis H. Jacobs.

1. FALSE PRETENSES—*Must be of Existing Facts.*—A false representation, within the meaning of the criminal code, must be of a present, material, existing fact, which the party making it knows, or has good reason to know, is false.

2. SAME—*Promises are Not.*—A promise is not a pretense.

Indictment, for false pretenses. Error to the Criminal Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in this court at the October term, 1897. Reversed. Opinion filed December 16, 1897.

BLUM & BLUM, attorneys for plaintiff in error.

Where false representations are relied upon, it is essential that they relate to some material existing fact or facts, and not to the future intention of the defendant, which he may or may not perform. In respect of the allegation of a promise to pay without any intention to perform, it is said in Kerr on Fraud and Mistake, 88: "As distinguished from the false representation of a fact, the false representation as to a matter of intention (though it may have influenced a transaction), is not a fraud in law." In Gage v. Lewis, 68 Ill. 604, after quoting the above from Kerr with approval, this court said: "It can not be said that these representations and promises were false when made, for until the proper time arrived and the plaintiff refused to comply with them, it could not positively be shown that they would not

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be performed. Even if at the time they were made, it was not intended to comply with them, it was but an unexecuted intention which has never been held of itself to constitute fraud." *People v. Healy*, 128 Ill. 13; *Bishop on Criminal Law*, Vol. 2, Sec. 420 (7th Ed.).

CHARLES S. DENEEN, state's attorney, for defendant in error.

It may rarely occur, that the falsehoods alone which are uttered are the sole influences which produce the effect. They may, and most generally are, ingeniously combined with truths. Nay, expressions of countenance, a smiling face, an appearance of frankness and of truth, may often prove decisive, while the false pretenses uttered or expressed, would have proved unavailing. *Cowen v. The People*, 14 Ill. 351.

MR. PRESIDING JUSTICE ADAMS DELIVERED THE OPINION OF THE COURT.

The plaintiff in error, Louis H. Jacobs, was convicted on an indictment charging that he, Louis H. Jacobs, on June 10, 1893, in said county of Cook, did, with Nathan Neufeld and divers persons, whose names are to the jurors unknown, feloniously and deceitfully conspire together with the fraudulent and malicious intent, then and there feloniously, unlawfully, wrongfully and wickedly to obtain a large amount of personal goods, funds, money and property, to wit, one hundred current United States treasury notes of the denomination of one hundred dollars, of the value of one hundred dollars each, etc. The indictment then proceeds to mention about all the different kinds of paper money and coin known to the law, and concludes as follows: "The personal goods, funds, money and property of one Dora Marks, from the said Dora Marks by false pretenses, and to cheat and defraud the said Dora Marks of the same," etc.

May 29, 1893, a certain agreement in writing was made between Frank H. Van Cleave, of Escanaba, Michigan, party of the first part, and Nathan Neufeld, of Chicago, Illinois,

party of the second part, in and by which the said first party agreed that he would execute and cause to be executed a good and sufficient conveyance of certain premises situated in Escanaba known as the Cochrane Roller Mills plant and location, consisting of buildings and grounds theretofore used by the Cochrane Roller Mills Company, containing five and one-hundredth acres, and being more particularly described in the agreement; that the deed of conveyance should run to John Corcoran, as trustee, for the use and benefit of said second party, the condition of the trust being that said second party should comply with his part of the agreement; on which compliance, title to said property should vest in said second party. Said first party further agreed to pay a sum not exceeding \$2,000 for improvements to be made on the property suitable for a factory and operation thereafter mentioned, to be paid from time to time as the work on the improvements progressed. Nathan Neufeld, the said second party, agreed on his part, to establish on the premises a factory for the manufacture of furniture and other manufactures, to employ not less than sixty hands for a term not less than five years or not less than one hundred for a term not less than three years, at the option of said second party, and to give such hands average wages for like work, etc., and that he would commence operations in the factory with not less than thirty hands on or before August 1, 1893; also that he would cause the buildings to be insured, the policies to be made payable to the first party; that in case of destruction of the buildings by fire, he would rebuild and resume business with all reasonable dispatch; that on delivery of the agreement, the said second party would execute a bond with two satisfactory sureties, to the first party, in the penal sum of \$1,000, conditioned for the performance by said second party of his part of the agreement, said bond to be of effect for only three months after commencement of operations in the factory. Differences of opinion as to the interpretation of the agreement to be settled by arbitration.

This contract was subsequently assigned by Neufeld to the Chicago Furniture and Lumber Company hereinafter mentioned.

Prior to the execution of the above contract, and before the prosecuting witness, Dora Marks, appeared on the scene, it appears, from the evidence, that a similar contract had been made by Nathan Neufeld with the city of Escanaba, but an attorney having advised that the city could not directly make such a contract, the above contract was made, the city of Escanaba being the real party to the contract and Van Cleave a merely nominal party. The object of the contract on the part of the city was to obtain the benefit which might result from having such a factory as is described in the agreement established in the city.

The evidence shows that Neufeld had, for a number of years, been largely engaged in the business of manufacturing furniture in the city of Chicago, that Jacobs had been employed for years as a traveling salesman for the Judkins Company, which company was engaged in the business of manufacturing furniture in Chicago, and was so engaged while the negotiations were progressing in reference to the Escanaba enterprise, and was in the enjoyment of a salary of \$2,000 per annum and one-fifth of the net profits of the company, the company paying his traveling expenses.

About May 20, 1893, Dora Marks, the prosecuting witness, came to Chicago to visit the World's Fair, when she met Jacobs, with whom she had been acquainted for twenty-eight or thirty years. Prior to this time, Jacobs, who, with his wife, boarded at Neufeld's house, had been informed of the contemplated establishment of a factory at Escanaba, had met some parties who had come from Escanaba to Chicago to negotiate with Neufeld, and Neufeld, for whom Jacobs had worked prior to the year 1889, had offered him inducements to take part in the Escanaba enterprise, as he, Neufeld, wanted Jacobs' services in the business. Such being the status of affairs, Jacobs, about between May 22 and May 25, 1890, told Mrs. Marks of the Escanaba enterprise, and asked her how her husband had left her, and learned from her that he had left her a piece of property in Denver, Colorado, incumbered for \$15,000, and a legacy of \$10,000, and that she had with

her a certificate of deposit for \$7,000, which she showed him. About May 24, 1893, Jacobs went to Escanaba with Neufeld, examined the plant, and returned to Chicago very enthusiastic in regard to the proposed enterprise. Jacobs testified: "I went up with him, saw the place and was very much enthused over it. It looked like a great opportunity to become possessor of a very valuable piece of property. I was shown around the place by the men there—business men, city officials, who took us out and showed us what the probable cost of lumber would be; that we could obtain very good manufacturing goods, and the quantities that could be obtained, and the shipping facilities," etc. When Jacobs returned to Chicago from Escanaba, he informed his wife and Mrs. Marks that the plant was the finest he had ever seen for a city to offer, and that he was going to withdraw from the Judkins Company, of which he was then vice-president, and go into the Escanaba enterprise, and advised Mrs. Marks also to go into it, which she at that time declined, on the ground that the \$7,000 certificate was all she then had, and she wished to reserve it to meet the mortgage on her Denver property, and nothing more was said on the subject at that time.

June 6, 1893, Mrs. Marks, at the solicitation of Jacobs, as she testified, went to Escanaba with Jacobs and Neufeld and their wives. Mrs. Marks testified that while there "they showed me the plant and took me all over—showed me the plant and the boarding houses, lovely barn, and everything on the place. 'Well,' I said, 'no use talking, this is a fine place, but it will take lots of money to run this place.' Mr. Jacobs said to Mr. Neufeld, 'Well, we have got all the money we want to run this.' Then we went to see Mr. Van Cleave." The next morning, June 8, 1893, Mrs. Marks testifies, Jacobs invited her and Mrs. Jacobs to take a walk, and she, Neufeld and Jacobs and their wives, went to the office of a Mr. Gallup, a lawyer, she, Mrs. Marks, not knowing where they were going, where she says the following occurred: "We sat down at the door and Jacobs and Neufeld near Gallup's desk, and Gallup sat down at the

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desk and said, 'Well, Mr. Jacobs, how much money are you going to put into this?' Mr. Jacobs said, '\$12,500.' Mr. Gallup says, 'Cash?' and he says, 'Yes, cash.' He turned to Mr. Neufeld and said, 'Mr. Neufeld, how much are you going to put into this?' He says, '\$25,000.' He says, 'Cash?' He says, 'Yes, cash.' He turned to me and said, 'How much are you going to put into this, Mrs. Marks?' Well, I was rather surprised, and before I spoke, Mr. Jacobs spoke for me. He said: 'Mrs. Marks will put in \$5,000.' Mr. Gallup turned to me and said, 'Are you going to put in \$5,000?' I said 'I had't thought much about it,' so then we all left the office together." On cross examination, Mrs. Marks testified that she didn't think they were in Gallup's office more than five minutes. Her statement as to what occurred in the office and the time occupied there, is contradicted both by Jacobs and Gallup. Jacobs testifies that he and Neufeld had seen Gallup on the afternoon of June 7, 1893, and were advised by him what was necessary to be done to incorporate under the laws of Michigan; that they informed Marks of this; that she knew where she was going on the morning of June 8th, and what was expected of her; that they remained in Gallup's office two or three hours, Mrs. Marks being present all the time; that Gallup went over the whole ground again, explaining what was necessary to be done in order to incorporate, stated what the capital stock was to be; stated the amount which each was to subscribe for, asked if that was right, and was informed that it was, and, no one making any objection, drew up the following contract, which they all signed:

"LAW OFFICE OF GEORGE GALLUP,
ESCANABA, Mich., June 8, 1893.

ARTICLES OF AGREEMENT, made and entered into this 8th day of June, A. D. 1893, by and between Nathan Neufeld, Louis H. Jacobs and Dora Marks, all of the city of Chicago, Ill.

WHEREAS, said N. Neufeld has a certain contract with one F. H. Van Cleave, of the city of Escanaba, Michigan, and whereas the above named parties, Neufeld, Jacobs and

Marks, propose to form a corporation of \$200,000 capital stock, to be known as the Chicago Furniture & Lumber Co.

And therefore it is hereby agreed by and between said parties, for a valid consideration, each with the other, that they will subscribe for stock as follows :

Nathan Neufeld.....\$182,500

Louis H. Jacobs..... 12,500

Dora Marks..... 5,000

It is further agreed by and between said parties, that said N. Neufeld shall assign to said L. H. Jacobs \$37,500 of his stock, and to Dora Marks \$15,000, and that he will hold \$30,000 for the use and benefit of said corporation.

In witness whereof the parties have hereunto set their hands the day and date first above written.

NATHAN NEUFELD,

LOUIS H. JACOBS,

DORA MARKS."

Jacobs further testifies that Mrs. Marks told Gallup she was willing to invest \$5,000, but did not want to go into it if she would be liable beyond that amount, and he informed her that she would not. Also, that there was no such talk as testified to by Mrs. Marks, that the word "cash" was not used. Gallup testifies that Neufeld, Jacobs and their wives and Mrs. Marks, came to his office between 10 and 11 A. M., and remained there from one and a half to two hours; that they talked about the incorporation, but as he had no blanks then, it was concluded not to prepare articles of incorporation at that time; that Mrs. Marks asked him if she would be liable beyond the amount of stock she subscribed for, and he advised her that, in his judgment, she would not; that he drew up the agreement heretofore mentioned, and they signed and left it with him, with the understanding that he should keep it for all of them, but that any of them could have a copy of it on request, and that he kept it in his possession until about a week before he testified on the trial, when he gave it to Mr. Blum, the attorney for plaintiff in error. Gallup also testifies that when the parties were at his office he made an appointment

to meet them in Chicago, after he had drafted the articles of incorporation, which he did June 12, 1893. The witness further testified that the amount which each was to subscribe for was mentioned at his office, but he could not recollect any conversation in respect to whether the subscriptions were to be "cash."

Mrs. Marks testified that she did not sign the contract of date June 8th at the time of its date, but in the following August, but her evidence in that regard is of little or no value, because she says she did not read it. If she signed it without reading, it is difficult to understand how she could identify it as a paper signed by her in August.

The trial occurred in February, 1897, and Gallup testified positively that the contract had been in his possession from the time it was signed in his office June 8, 1893, until about a week before the day on which he testified, which being true, Mrs. Marks could not have signed it in August, 1893. Jacobs also swears that it was signed on the day of its date; and the presumption would be, in the absence of evidence to the contrary, that it was signed on that day. We are of opinion that there is a decided preponderance of evidence that the contract of date June 8, 1893, was signed on the day of its date. That contract is evidence that on the day of its date, Mrs. Marks agreed to join Neufeld and Jacobs in the formation of a corporation, and to receive stock in proportion to her subscription. The evidence shows that subsequently, on June 12th, Gallup brought to Chicago the articles of incorporation, and that Neufeld, Jacobs and Mrs. Marks signed the articles.

The only alleged false pretenses claimed to have been made prior to the signing of the contract of June 8, 1893, were the statements claimed by Mrs. Marks to have been made by Neufeld and Jacobs in Gallup's office, namely, by Jacobs that he would put in \$12,500 cash, and by Neufeld, that he would put in \$25,000 cash. That such statements were made, is not only contradicted by Jacobs, but in part by the testimony given by Mrs. Marks herself, in her suit against the Chicago Furniture and Lumber Company, in

Michigan. It was proved on the trial that in the Michigan case the following question was asked her, and she answered as follows:

Q. "How was Mr. Neufeld to pay this money in, this \$25,000?"

A. "He was to pay it all in; this \$25,000 was to be cash he talked about; that it was to be put in just as the business required it. He said it would not be necessary to put it all in right away, but he was going to make a big showing in the bank, and he was always going to keep plenty of money in the bank."

After Mrs. Marks had been told by Neufeld that it would not be necessary to put in the whole amount of his subscription at once, that it was to be put in as the business required, she certainly could not have understood from the conversation in Gallup's office, even if such conversation occurred as she states, that Neufeld was to pay in the whole \$25,000 at once. Even though Gallup asked and Neufeld and Jacobs answered questions in Gallup's office, as the witness Marks states, it would not then follow that their subscriptions were to be paid at one time and in full. To say that one is to put into a corporation \$12,500 or \$25,000 in cash, is not by any means to say that the amount is to be all paid at one and the same time. But the statements of Neufeld and Jacobs, even if made as the witness Marks testifies and construed as she now construes them, were merely promissory, and not criminal pretenses, within the meaning of the law. Such representations would not be sufficient even to sustain a civil action for fraud, the rule being that the representation must be of a present, material, existing fact, which the party making it knows, or has good reason to know, is false. *People ex rel. v. Healy*, 128 Ill. 9.

"A promise is not a pretense." 2 Bishop's New Criminal Law, Sec. 419, and cases cited in n. 2; 2 Archbold's Crim. Pr. and Pl., 465.

The articles of association were put in evidence by the prosecution, and show that the capital stock of the corporation, the Chicago Furniture & Lumber Company, was

\$200,000, divided into 20,000 shares of the par value of \$10 each, and that Dora Marks subscribed for 500 shares; and the evidence shows that Neufeld, Jacobs and Mrs. Marks signed the articles in Chicago, June 12, 1893.

The evidence shows, also, that Mrs. Marks can read, and that she did read some of the documents in evidence. She acknowledged her signature to the articles of incorporation in Chicago, before Gallup, he acting as a notary, but it appears that he could not legally take an acknowledgment outside the county in which he lived in Michigan. Mrs. Marks testifies that, subsequently, on June 16, 1893, she was informed by Jacobs that they were ready to put their money in, and that she, Jacobs and Neufeld, met; she says: "It was a \$7,000 certificate, but I was to put in \$5,000. I signed it and I says: 'Now where is your money?' Mr. Neufeld took three papers out of his pocket, a white certificate, one that looked like mine, and two light blue papers, and he says: 'Here is our money,' and I gave Mr. Jacobs my certificate."

Jacobs testified that Mrs. Marks asked no such question as "Have you your money ready?" and that he didn't see Neufeld hold out three papers, one white and two blue, or anything of that kind.

The State relies on the alleged statement of Neufeld and the production by him of the white and blue papers, as a false pretense, by reason of which the prosecuting witness was induced to part with her money. Mrs. Marks could read, her evidence indicates that she is a woman of at least average intelligence and of average ability to understand and protect her own interests, and it seems incredible that she was induced to advance her money on the faith of pieces of paper which she did not examine, ask to look at, or even inquire what they contained. It seems much more reasonable and probable that she advanced her money because of the obligations she had incurred. She had concluded, as she herself admits, to join in the enterprise; had signed the contract of June 8, 1893, agreeing to form a corporation; had signed the articles of incorporation which recite a subscrip-

tion by her for 500 shares of stock of the par value of \$10 each, and had thus become liable to the corporation to the extent of her subscription, and this, of itself, was a sufficient reason for her advancing the money.

In *People v. Thomas*, 3 Hill, 169, the indictment charged that Thomas, being the owner of a promissory note made by Jones, falsely pretended that the note had been burned or lost, by reason of which false pretense he obtained from Jones the amount of the note. The court say: "*Non constat* from the indictment that Jones sustained any damage by the false representation; nor that there was any intent on the part of Thomas, at the time of the representation, to work any damage. The note was due and payment was made. This was the only consequence—a thing which Jones was bound to do. A false representation by which a man may be cheated into his duty, is not within the statute."

The money advanced was due, not to Jacobs or Neufeld, of either of them, but to the company, and was obtained, not for them or either of them, but for the company, and the evidence shows that, by the request of Mrs. Marks, the \$7,000 certificate of deposit was deposited in bank in Escanaba for collection, and when collected a certificate of deposit for \$2,000 was returned to her, and the balance, viz., \$5,000, was credited to the company.

The factory in Escanaba was operated by the new corporation for six months, until the prosecuting witness sued out a writ of attachment against the company in Michigan, thus temporarily suspending the business, and Jacobs, the plaintiff in error, who had resigned a situation in which he had been earning over \$2,000 per annum, for the purpose of engaging in the enterprise, and who had advanced \$1,000 to the new company, devoted his time and attention to the business of the company for six months, and received for his services only \$800, which was all he ever received from the company.

We are clearly of opinion that the evidence does not sustain a conspiracy as charged in the indictment, and that if there was any concert of action between Jacobs and Neu-

O'Kane v. West End Dry Goods Store.

feld, in reference to the prosecuting witness Marks, it was, to induce her to join them in a perfectly legitimate enterprise, and not to obtain her money, as charged.

The attorney for plaintiff in error having expressly waived all technical objections, we have considered the case solely on its merits.

The judgment will be reversed.

M. C. O'Kane and John F. Eagan v. West End Dry Goods Store.

1. *INJUNCTIONS—Issuing of, Without Notice, as Cause of Complaint on Appeal.*—That an injunction was issued without notice, and without any sufficient showing to avoid notice, can not be complained of on appeal, where, after the writ was issued, and prior to the appeal, there was a hearing on the merits, on a motion to dissolve.

2. *SAME—Allegations of Fraud in Bills to Restrain the Use of a Name.*—Allegations of fraudulent acts and intent, on the part of defendant, in a bill to restrain the use of the name of a business house, are sufficient to sustain the bill.

Bill, to enjoin the use of a name. Appeal from the Superior Court of Cook County; the Hon. HENRY V. FREEMAN, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed July 26, 1897.

HAMLIN, HOLLAND & BOYDEN, D. M. ROTHSCHILD, and BLUM & BLUM, attorneys for appellants.

An injunction should not be granted without notice unless it is made to appear that complainant would be put in a worse position by giving notice. *Becker v. Defebaugh*, 66 Ill. App. 504; *Brough v. Schanzenbach*, 59 Ill. App. 407; *King v. Pardridge*, 60 Ill. App. 475; *Hovnanian v. Bedesern*, 63 Ill. App. 353; *Nusbaum v. Locke*, 53 Ill. App. 242.

A generic name, or one merely descriptive of the article made or sold, or its qualities, ingredients or characteristics, and which may be used truthfully by other makers or dealers, is not entitled to protection as a trade-name or trade-mark. *Bolander v. Peterson*, 136 Ill. 215.

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85	405
72	297
86	633

No one can apply a name of a district or country to a well-known article of commerce and obtain thereby such an exclusive right to the application as to prevent others inhabiting the district or dealing in similar articles coming from the district from using the same designation. *Elgin Butter Co. v. Elgin Creamery Co.*, 155 Ill. 127.

JULIAN W. MACK, attorney for appellee.

The rights here claimed are not only the protection of a trade-name but also protection against the unfair competition of defendants. The bill distinctly alleges that the defendants are representing their business to be a part of the business of the complainant. This in itself, entirely independent of any question of trade-mark or trade-name, is such a fraudulent competition that a court of equity will not hesitate for a moment to enjoin it under the circumstances stated in the bill and affidavit.

The rule of law which denies protection to a geographical name is subject to this limitation: that if the name has acquired a secondary meaning indicating in the case of a trade-mark that the goods are manufactured by a certain person, or in the case of a trade-name, that the business belongs to a certain person or corporation, then the protection will be granted. The bill in this case alleges that the name claimed has acquired such secondary meaning in association with the business of complainant.

A few out of many cases that could be cited are respectfully submitted, in each of which a geographical name, having acquired this secondary meaning, was protected: (*Shrewsbury Patent Thread*) *Marshall v. Ross*, L. R. 8 Eq. 650; (*London Conveyance Co.*) *Knott v. Morgan*, 2 Keen, 213; (*Carlsbad Sprudel Salz*) *City of Carlsbad v. Kutnow*, 18 C. C. A. 24; (*Willoughby Lake Stones*) *Cleveland Stone Co. v. Wallace*, 52 Fed. Rep. 431; (*Glenfield Starch*) *Wotherpoon v. Currie*, 42 L. J. Ch. 130; (*Stone Ale*) *Montgomery v. Thompson*, 64 L. T. R. 349; (*Yankee Soap*) *Williams v. Adams*, 8 Biss. 452; (*Lexington Mustard*) *Metcalfe v. Brand*,

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5 S. W. 773; (Portland Stoves) Van Horn v. Coogan, 28 Atl. 788; (Canadian Club Whisky) Walker & Son v. Mikolas, 79 Fed. Rep. 955; (Akron Dental Rubber) Kellar v. Goodrich, 117 Ind. 556; 19 N. W. 196.

MR. JUSTICE SEARS DELIVERED THE OPINION OF THE COURT.

This is an appeal from an interlocutory order granting an injunction.

The injunction was issued without notice, and without any sufficient showing to avoid notice. But this can not be availed of by appellants now, for since the writ was issued, and prior to this appeal, there has been, as shown by the record, a hearing of the merits of the order, upon a motion to dissolve, in which appellants appeared and were heard. In *Brown v. Luehrs*, 79 Ill. 575, it is said :

"It is objected that the preliminary injunction should not have been granted without notice to appellants. Admitting this, we do not perceive how advantage is to be taken of it in the way of reversing a decree on final hearing, making the injunction perpetual, where the proof justifies a decree for an injunction." High on Inj., Secs. 1580 and 1615.

The same reasoning applies to the case here, viz., that after the order has been determined to be proper upon a hearing, participated in by both parties, it is too late to raise questions as to this informality in the original issuing of it.

It is urged by appellants that the bill is insufficient in its averments to entitle complainants to an injunction.

The bill prays for no other relief.

Without discussing the question of proprietary rights to the name in controversy, it is enough to say that the allegations of fraudulent acts and intent on the part of defendants is sufficient to sustain the bill. *Merchants Detective Ass'n v. Detective Mercantile Agency*, 25 Ill. App. 259, and cases therein cited. The order is affirmed.

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73	188

72	300
80	369

72	300
90	369

Cicero & Proviso Street Railroad Company v. William E. Snider.

1. NEGLIGENCE—*Care Required of Plaintiff in Actions Based on.*—In a personal injury case an instruction stating that there could be no recovery unless the evidence showed “that the plaintiff was not guilty of negligence on his own part, materially contributing to the injury,” is erroneous. If negligence by the plaintiff contributes in any degree whatever, it bars a recovery.

Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Heard in this court at the March term, 1897. Reversed and remanded. Opinion filed July 26, 1897.

ALEXANDER SULLIVAN, attorney for appellant; E. J. McARDLE, of counsel.

Where the plaintiff is guilty of any want of ordinary care, and it contributes to his injury, his action is defeated, and it is erroneous to tell the jury by an instruction that to defeat the action, the contribution must be “material.” *Sterling Bridge Co. v. Pearl*, 80 Ill. 251; *Blanchard v. Lake S. & M. S. Ry. Co.*, 126 Ill. 416; *Wharton on Neg.*, 2d Ed. Sec. 424; *N. J. Ex. Co. v. Nichols*, 33 N. J. L. 434; *O’Brien v. Phila., etc., R. Co.*, 3 Phila. R. 76; *Wilds v. Hudson R. R. Co.*, 24 N. Y. 432.

JAS. S. HARLAN, attorney for appellee; S. S. GREGORY, of counsel.

MR. JUSTICE SEARS DELIVERED THE OPINION OF THE COURT.

This was a suit for personal injuries, which resulted in a verdict and judgment for \$25,000.

The assignment of error which seems to us most serious, is for the giving of the second instruction for appellee. The part complained of is worded as follows: “In cases of this character there can be no recovery by the plaintiff unless two things appear from a fair preponderance of the evidence.

First. That the injury was occasioned through the negligence or want of ordinary care and caution on the part of the defendant, as set out in the plaintiff's declaration.

Second. That the plaintiff was not guilty of negligence on his own part materially contributing to the injury."

The proposition of law embodied in this instruction is, at least inferentially, bad. It says by inference that if the negligence of plaintiff contributed to the injury in a degree which might be regarded by the jury as not "material," the plaintiff might, notwithstanding, recover. Such is not the law. If plaintiff's negligence contributed in any degree whatever, it barred a recovery. There can be no contributory negligence in contemplation of law, when there is an exercise of ordinary and reasonable care. *North Chicago St. R. R. Co. v. Eldridge*, 151 Ill. 549.

Nor is the fault of the instruction to be ignored because the proposition is thus inferentially put. *Monongahela City v. Fischer*, 111 Pa. State, 13, wherein the court say: "The affirmance of this point involves another error. It imposed a qualification upon the doctrine of contributory negligence that has not heretofore been recognized. It was, that if the negligence of the plaintiff did not 'contribute in a material degree to the accident' he could recover. * * * The doctrine of this court has always been that if the negligence of the party contributed in any degree to the injury, he can not recover. This is a safe rule. * * * But if we substitute the word 'material' for the word 'any,' we practically abolish the rule." Also *Mattimore v. Erie City*, 144 Pa. State, 23; *Artz v. Chicago, R. I. & P. R. R. Co.*, 38 Ia. 294.

In a case of this nature, involving a sharp conflict upon the merits, it may not be safely presumed that this instruction worked no prejudice to appellant.

The giving of the sixth instruction for appellee is also assigned as error.

While this instruction might have been more carefully worded as to the precise extent of plaintiff's duty in care for his own safety, we are yet not inclined to regard it as ground for reversal.

Counsel for appellant urge very strenuously that the lan-

guage of counsel for appellee in argument upon the trial, was such as was calculated to prejudice the minds of jurors, and hence constituted error.

While we do not hesitate to designate the language complained of as immoderate, and such as the trial court might properly have checked, yet somewhat must be allowed for the zeal of advocacy, and in a case otherwise so fairly conducted by counsel for appellee, we would not treat this as reversible error.

The facts as presented are such as must be submitted to another jury.

For the error in the giving of the second instruction for appellee, the judgment is reversed and the cause remanded.

Emily C. Dow v. Milton O. Higgins.

1. INSTRUCTIONS—*Increasing the Burden of Proof.*—An instruction which requires something more than the mere preponderance of the evidence necessary in civil cases, as the basis of the finding of a jury, is erroneous and will necessitate the reversal of the judgment if there was any conflict in the evidence.

2. PROMISSORY NOTES—*In Settlement of Gambling Contracts Void.*—Under Section 186 of Chapter 88, R. S., entitled the "Criminal Code," a note given in settlement of a gambling transaction is subject to the same defense in the hands of an innocent purchaser as in the hands of the original payee.

3. SAME—*Innocent Holders of Illegal Paper.*—An innocent purchaser of negotiable paper can not be protected merely because he is a *bona fide* holder who has acquired for value before maturity and without notice, as against the defense of illegality of consideration, when such illegality arises from express prohibition of the statute and when the statute in terms makes the instrument void.

4. ESTOPPEL—*To Defend Against Gambling Contracts.*—The maker of a note given in settlement of a gambling contract signed a paper, at the same time stating that he had given the note for a good and valuable consideration and that he had no defense to it. In a suit upon the note it was held that the writing could not be availed of as an estoppel *in pais* to preclude the defense of illegality.

Assumpsit, on a promissory note. Error to the Circuit Court of Cook County. The Hon. ABNER SMITH, Judge, presiding. Heard in this court

Dow v. Higgins.

at the October term, 1897. Reversed but not remanded. Opinion filed December 16, 1897.

JOHN H. ROLLINS, attorney for plaintiff in error, and D. M. KIRTON, of counsel, contended that the notes are absolutely void, even in the hands of an innocent purchaser for value before maturity. See Sec. 136, Criminal Code; Chapin v. Dake, 57 Ill. 295; Williams v. Judy, 3 Gilm. 282. No statement could validate them, and the written statement is in effect no more than what the notes imply without it.

J. J. PARKER, attorney for defendant in error; MILTON O. HIGGINS, *pro se*.

Where the maker of a note says to a buyer that the note is all right, he can not defend. If the holder bought with the maker's knowledge and consent, he is estopped from defending. Ivey v. Nicks, 14 Ala. 564; Casco Bank v. Keen, 53 Me. 104; Hefner v. Dawson, 63 Ill. 403; Needham v. Clary, 62 Ill. 344; Smith v. Newton, 38 Ill. 230.

A much broader scope has been given to the doctrine of estoppels *in pais* than formerly, and it is established that whenever an act is done or statement made by a party which can not be contradicted without fraud on his part, or injury to others whose conduct has been influenced by the act or admission, it will be binding. Smith v. Newton, 38 Ill. 230.

MR. JUSTICE SEARS DELIVERED THE OPINION OF THE COURT.

This is a suit upon promissory notes, given by plaintiff in error to one Holzapfel and by him transferred to defendant in error for value and before maturity.

The defense interposed was that the notes were given in settlement of a gambling transaction, prohibited by statute, and hence are void.

Defendant in error replied, denying this, and also by his second replication pleaded estoppel *in pais* by reason of a statement in writing, made by plaintiff in error, upon which it is alleged that defendant in error relied at the time of purchasing the notes.

The evidence shows conclusively that the notes were

given on account of a gambling transaction, viz., dealings in options upon future purchases and sales of grain.

Two assignments of error are urged by counsel: First, the giving of the first instruction for plaintiff in trial court, defendant here; and second, the admission of evidence under the second replication.

The instruction complained of is: "The court instructs the jury that the making of the two notes in suit being admitted by the defendant, and the ownership of the plaintiff being shown, the burden of proof to establish a defense to the notes rests on the defendant. And the only defense set up by the defendant being that the notes were given in renewal of a note of \$500, which was itself given to settle a claim for differences and certain fictitious dealings in grain or options, it devolves on the defendant to satisfy the jury that the said notes were given in renewal of said \$500 note, and to satisfy the jury by a clear preponderance of the evidence that such note for \$500 was given for differences in pretended dealings in grain."

The instruction is faulty in that it requires something more than the mere preponderance of the evidence, necessary in civil cases, as the basis of the finding of the jury. *Stratton v. The Central C. H. Ry. Co.*, 95 Ill. 25; *Ottawa, O. & F. R. V. Ry. v. McMath*, 4 Ill. App. 356; *Bauchwitz v. Tyman*, 11 Ill. App. 186.

And the giving of this instruction would necessitate the reversal of the judgment, if there was any conflict in the evidence.

But the more important question, and one which we regard as determinative of this cause, is the question of the sufficiency of the matters pleaded in the second replication.

The writing which is therein pleaded as constituting estoppel *in pais* is as follows:

"CHICAGO, December, 1895.

I, Emily C. Dow, do hereby certify that the two promissory notes, bearing even date herewith, for two hundred and fifty dollars each, and payable to my order in thirty and sixty days after date, are given by me for a good

and valuable consideration, and that I have no defense to either of them. EMILY C. Dow."

It appears to have been made and delivered to the payee contemporaneously with the execution of the notes, and to have been received by defendant in error at the time of purchasing the same.

The question presented is: Can this writing be availed of as an estoppel *in pais* to preclude the defense of illegality, and to effect the enforcement of so much of the illegal contract as is included in the collection of those notes, which the statute declares to be void?

It has been, in general terms, held that there can not be any estoppel against showing that a contract is made void by statute. Bigelow on Estoppel, p. 558, note; Rosebrough v. Ansley, 35 Ohio State 107; Coppell v. Hall, 7 Wall. (U. S.) 542; Oscanyan v. Arms Co., 103 U. S. 268; Sherk v. Phelps, 6 Ill. App. 619; Durkee v. The People, 53 Ill. App. 396; affirmed in Durkee v. The People, 155 Ill. 354.

It will be observed, however, that in each of these cases, and in the others upon which the expressions of the text writers are based, the doctrine of estoppel has been sought to be applied in behalf of one of the parties to the illegal transaction to enforce it as against the other party thereto.

And there are cases which hold that when the estoppel is invoked by an innocent third party, it may avail even as against the plea that the transaction is by statute made wholly void. Davison v. Franklin, 1 Barn. & Ad. 144, where it was applied to a gaming transaction, which, under Stat. 9 Ann, Ch. 14, made the security in question wholly void. Also, Payne v. Burnham, 62 N. Y. 72, where it was applied to a usurious contract, which, under the statute there controlling, was void.

By force of our statute, Sec. 130, Criminal Code, this transaction as between the maker and payee of these notes, is not only made void, but by Sec. 136 of the Criminal Code, the notes are subject to the same defense when in the

hands of a purchaser for value without notice and before maturity.

And, irrespective of Sec. 136 of our statute, the rule may be said to be well settled, that an innocent purchaser of negotiable paper can not be protected merely because he is a *bona fide* holder, who has acquired for value before maturity and without notice, as against the defense of illegality of consideration, when that illegality arises from express prohibition of the statute, and when the statute in terms makes the instrument void. 1 Daniel's Neg. Insts. 807; Chitty on Bills, 116; Bayley on Bills, 69; Early v. McCarl, 2 Dana (Ky.), 414.

The position of defendant in error as an innocent purchaser before maturity, can not, therefore, avail him, and there are reasons peculiar to this case why, here at least, the estoppel pleaded can not be permitted. The writing in question was given at the time of the making of the notes. It was a statement sent out with the notes, and not a representation made peculiarly to the purchaser, defendant in error, in response to any inquiry made by him.

It amounted simply to a repetition of the announcement of the notes themselves, and contemporaneously with the execution of them. If the purchaser may not, under the rule above stated, rely upon representations placed upon the face of the note and included in it, no more, in principle, could he rely upon the same representations made at the same time separately and attached to the note. 1 Daniel on Neg. Insts. 862; Jaqua v. Montgomery, 33 Ind. 36.

We conclude, therefore, that the doctrine of estoppel *in pais* can not be invoked to apply to the facts presented in this case.

As this determination amounts to an exclusion of the matters relied upon by way of reply in the second replication, and as no other issue is raised by the evidence, it being in effect conceded that the notes were given in settlement of a gaming transaction, and are within the application of Secs. 130 and 136 of the Criminal Code, it only remains to reverse the judgment without remanding. Judgment reversed.

Nathaniel C. Foster v. Mary C. Van Ostern.

1. **EQUITY PRACTICE—*Exceptions to Master's Report.***—When a party is dissatisfied with the finding of the master, he must make distinct exceptions, so the court can readily understand what matters are at issue between the parties, otherwise it will be understood that he acquiesces in such findings.

2. **SAME—*Failure to Except in Trial Court.***—A party who is dissatisfied with the findings of the master and fails to except to them in the trial court can not do so on error or appeal.

3. **SAME—*Reference to Exceptions in Decree.***—A mere reference to exceptions in the decree does not supply the absence from the records of specific objections. A court of review can not pass upon exceptions in ignorance of what they were.

4. **AMENDMENTS—*Application for Leave Must be Made in Apt Time.***—An application by a defendant in a suit in equity for leave to amend his answer and cross-bill must be made in apt time, so that the complainant may not be surprised or the cause delayed; it is too late after the evidence is closed and the report of the master is filed.

Mortgage Foreclosure.—Error to the Circuit Court of Cook County; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the October term, 1897. Affirmed. Opinion filed December 16, 1897.

THOMPSON & McCASLIN, attorneys for plaintiff in error.

JAMES E. PUENELL, attorney for defendant in error.

MR. PRESIDING JUSTICE ADAMS DELIVERED THE OPINION OF THE COURT.

January 17, 1893, one Mary L. Greene was indebted to Nathaniel Foster in the sum of \$1,000, evidenced by her three promissory notes of same date, one for \$500, due May 1, 1893, and two for the sum of \$250 each and due respectively June 1, 1893, and July 1, 1893, each of said notes being payable to the order of Nathaniel Foster, and bearing interest at the rate of six per cent per annum. To secure payment of this indebtedness Mary L. Greene, executed to Foster a chattel mortgage of certain property, of even date with the notes, which is in the usual form and which was duly acknowledged and was recorded April 5, 1893, at 12 o'clock noon.

The defendant in error, claiming to be the owner of the note for \$500, due May 1, 1893, by purchase and assignment from plaintiff in error some time in May, 1893, after the note had matured, filed a bill July 19, 1893, making plaintiff in error and Mary L. Greene defendants, praying a foreclosure of the mortgage, and in case the proceeds of the sale of the property should not be sufficient to pay the note, etc., for a judgment *in personam* against Mary L. Greene. The bill alleges that the defendant, Foster, made an endorsement on the note to the effect that the same should be payable to complainant, but added thereto, without any agreement on her part, the words "without recourse." Plaintiff in error answered the bill admitting the endorsement as alleged in the bill, but denying the assignment to defendant in error as therein alleged, and averring that on or about May 1, 1893, Mary L. Greene paid the \$500 note, and it was surrendered to her; and also that he, plaintiff in error, was the sole owner of the remaining notes and the chattel mortgage.

Mary L. Greene answered, admitting the execution of the notes and mortgage, and averring that she, Greene, paid the \$500 note with money loaned to her by defendant in error, and that by agreement with her, she, Greene, permitted her to retain the note as evidence of the loan. Plaintiff in error filed a cross-bill averring that defendant in error loaned to Mary L. Greene money to pay the \$500 note, and that it was paid by Greene; that plaintiff in error is the owner of the remaining notes, and the mortgage, admitting the endorsement and denying the assignment, praying for an accounting, and that he be held to have a first lien, and that the mortgaged property be sold to satisfy his debt, and that defendant in error be held to have no lien, etc.

Answers were filed to the cross-bill by defendant in error and Mary L. Greene, but as they do not change the issues made by the pleadings already noticed, it is unnecessary to refer to them in detail. The issues of fact between plaintiff in error and defendant in error was whether the \$500 note was purchased by defendant in error and assigned to her as

averred in her bill. September 26, 1893, after the cause was at issue, the court referred it to the master to take proofs and report the same to the court, with his opinion as to law and evidence. The master finds, among other things, as follows: "That the defendant endeavored to show the complainant merely loaned \$500 to the defendant, Greene, as a matter of friendship, and that the complainant took the note from Mr. Wells as an evidence of the loan; that the circumstances in the case do not support the position, and that the complainant had the same security that Mr. Foster had and should stand in his position." Having examined the evidence we fully concur in the finding of the master.

The endorsement on the note is as follows:

"Pay to the order of Mary C. Van Ostern without recourse.

Sig. N. C. FOSTER."

Plaintiff in error did not deny the genuineness of the endorsement or his signature thereto. On the contrary his evidence tends to corroborate that of defendant in error. Plaintiff in error was a resident of the State of Wisconsin, and one Wells was his agent in this city and had the note in question in his possession, and originally held it for collection. Plaintiff in error testified: "I am under the impression that the note was sent to me and endorsed to Mr. Wells first, to pay him, and I really think it was sent back to be changed." In his cross-examination he was asked and answered as follows:

Q. "Do you recollect about the time that the note was transferred to Mrs. Van Ostern, the \$500 note in question?"

A. "I know about the time."

Q. "What was the date?"

A. "I could not give you the date."

Q. "What month was it?"

A. "I don't know that I could give the month it was transferred, it was done through Mr. Wells."

Wells, agent of the plaintiff in error, testified that he gave a receipt to Mrs. Van Ostern at the time of the transaction in question. There is other evidence corroborative of that

of defendant in error, to which it is unnecessary to refer for reasons which will appear hereafter.

Counsel for plaintiff in error attempt to explain the evident inconsistency between the special endorsement of the note and the theory that the note was paid by the maker, Mary L. Greene, and was surrendered to her, by claiming that the note was endorsed for collection. This is no explanation. Wells, and not Mrs. Van Ostern, was Foster's agent, and the endorsement would prevent collection by Wells, because after the endorsement he could not collect without an additional endorsement by defendant in error.

A large part of the brief of counsel for plaintiff in error is devoted to a discussion of the evidence for the purpose of showing that the master's findings were erroneous, but no exceptions to the master's report have been preserved.

It is true the decree recites that the cause was heard on the pleadings and proofs, oral and documentary, submitted to the master, and exceptions filed to the master's report, but if there were any such exceptions, they are not shown in the abstract or in the record. "The practice is, when a party is dissatisfied with the finding of the master in chancery, he shall make distinct exceptions, so the court can readily understand what matters are at issue between the parties, otherwise it will be understood he acquiesces in the conclusions and findings of the master." *Singer et al. v. Steele*, 125 Ill. 426. And if he fails to except below, he can not do so on error or appeal. A mere reference to exceptions in the decree no more supplies the absence from the record of specific objections, than does the recital of a motion for a new trial in a judgment at law obviate the necessity of such motion appearing in the bill of exceptions. It is obvious that a court of review can not pass on exceptions in ignorance of what they were.

It is assigned as error, that the court refused to allow amendments to be made to the answer and cross-bill of plaintiff in error. After the master's report was filed, plaintiff in error moved for permission to amend his answer and cross-bill by setting up a mortgage executed by Mary L.

Greene to him of the same property described in the mortgage which defendant in error sought by her bill to foreclose, and of the same date as said last mentioned mortgage, and recorded at the same time, to secure payment to plaintiff in error of \$1,875, evidenced by promissory notes of even date with the mortgage, executed by Mary L. Greene to plaintiff in error, and due, respectively, one in each of fifteen months from the date thereof, the first being due in one month and the last in fifteen months from date. Plaintiff in error filed an affidavit in support of his motion, in which he sought to excuse his failure to set up the last mentioned mortgage in his original answer and cross-bill, by alleging that he was guarantor for Mary L. Greene on a lease assigned to her by a Mrs. Wickersham, who also sold her the mortgaged property; that Greene was largely behind in rent due by the terms of the lease; that the lessor had sued him, and that he feared originally to set up his mortgage in the present case, lest it militate against him in defending the suit on his guaranty, but that since said time he had been informed by counsel that such would not have been the effect of setting up the mortgages, etc. The excuse, in substance, is that plaintiff in error feared that if the plaintiff in the guaranty suit should know that he, plaintiff in error, had taken a mortgage to secure him against loss by reason of his guaranty, it might weaken his defense in the guaranty suit, and that rather than disclose the mortgage by setting it up in his original answer and cross-bill, he preferred to take his chances of defending against the bill of defendant in error on other grounds. This excuse, if it can be called such, was not entitled to serious consideration. The amendment sought to be made was material, the original cross-bill was sworn to, the proofs were closed, so that the application was not made in apt time, and no sufficient excuse was shown for not setting up the matter of the proposed amendments in the original answer and cross-bill. *Gregg v. Brower*, 67 Ill. 525.

Such an application must be made in apt time, so that the complainant may not be surprised or the cause delayed. *Maher v. Bull*, 39 Ill. 531.

The reference to the master was to take and report evidence, with his conclusions thereon, and the master's report having been filed before the application to amend was made, it was too late, because then no evidence beyond that contained in the report could be heard. *Cox v. Pierce*, 120 Ill. 556.

Under these circumstances the court was fully warranted in overruling the motion for leave to amend.

There was considerable evidence as to the question whether the words "without recourse" were or not added contrary to the agreement of the parties. The question is immaterial in the present case, because the only effect the words could have would be to exempt plaintiff in error from personal liability, and it was not sought to charge him personally, nor does the decree purport to so charge him. The \$500 note was what is called a judgment note, and it appears from the record that defendant in error had caused judgment to be entered on the note prior to filing her bill. Counsel for plaintiff in error insists that, defendant in error having elected to pursue her remedy at law on the note, she thereby waived the remedy by bill to foreclose the mortgage, and cites in support of this contention *Barchard v. Kohn*, 54 Ill. App. 629, but that case was reversed in *Barchard v. Kohn*, 157 Ill. 579; the court holding in the latter case, that the remedies are concurrent and neither exclusive of the other.

The \$500 note being the first to fall due, defendant in error had the prior lien. *Koester v. Burke*, 81 Ill. 436; *Jones on Mortgages*, Secs. 406, 1699.

It is also assigned as error that the decree is erroneous in not crediting plaintiff in error with the sum of fifty dollars on the proceeds of the sale of the mortgaged property. December 9, 1893, an order was made in the cause, directing plaintiff in error to sell the property described in the mortgage as soon as possible, for not less than \$300, and to hold the proceeds subject to the order and distribution of the court. December 10, 1894, an order was entered directing plaintiff in error to report to the court within five days,

his acts, etc., in relation to the sale of the property. After several extensions of the note and efforts of plaintiff in error to avoid compliance with the order, Mr. Thompson, solicitor for plaintiff in error, on January 10, 1895, made a report in the name of plaintiff in error, verified by his, Thompson's affidavit, stating in substance, that some time in December, 1893, the exact date he could not remember, he sold the property to one Paschal R. Smith, for the sum of \$300; that the defendant, Mary L. Greene, being unable to take care of the property, he had been compelled to place a man in charge of it at an expense of \$15, and to pay solicitor's fees in and about taking care of it and preserving it to the amount of \$35. It is not stated whether the charge of \$15 was made for the care of the property before or after December 9, 1893, when the order directing plaintiff in error to sell it was made, and it is admitted in the brief of counsel for plaintiff in error, that plaintiff in error took possession of the property about November 1, 1893, more than a month before the order directing a sale was made, and after the court had acquired jurisdiction of all the parties. This, if not a contempt of court, was clearly unwarranted, and it not appearing that the expense of taking care of the property did not accrue before the order of sale was made, the court was justified in not allowing the \$15 item. There is nothing in the report showing the necessity of the services of a solicitor in taking care of the property, nor that the fee charged, if any, was reasonable, and it is difficult, if not impossible, to understand how plaintiff in error could need any legal advice with regard to so simple a matter as taking care of the ordinary household furniture described in the mortgage. There was not a sufficient showing to entitle the plaintiff in error to the credit allowed. The decree is affirmed.

WINDES, J., took no part in this decision.

**David Strauss et al. v. American Exchange National
Bank of New York.**

1. **BANKS AND BANKING—*Presentation of Drafts—Assignment of Funds.***—Under the law of Illinois, the presentation and certification of a draft operates as an assignment to the payee of the funds of the drawer in the hands of the drawee to the amount of the draft.

2. **SAME—*Payment of Draft of Insolvent Drawees.***—A banker, who without notice of the drawer's insolvency, and in the ordinary course of business, pays a duly certified draft upon him out of funds in his hands to the credit of the drawer, will be protected from other creditors of the drawer to the amount of the draft so paid.

3. **SAME—*Payment of Certified Checks.***—Where the payee or holder of a check which is payable immediately, instead of demanding payment, procures the check to be certified, the check is, as between the drawer and holder, regarded as paid.

4. **LAWS—*Of Foreign States—How Proven.***—In a suit involving the laws of a foreign State, the existence of such laws must be proven the same as any other question of fact.

5. **PRESUMPTIONS—*As to Laws of Other States.***—In the absence of proof as to what is the law of another State, the court will presume it is the same as the law of Illinois.

Assignment Proceedings.—Error to the County Court of Cook County; the Hon. FRANK SCALES, Judge, presiding. Heard in this court at the October term, 1897. Affirmed. Opinion filed December 16, 1897.

PAM & DONNELLY, attorneys for plaintiffs in error, contended that the check in question was drawn upon a New York bank, sent to a New York bank for collection, made payable in New York through the clearing house in New York, was certified in New York, and finally paid in New York. That under these circumstances the contract was a New York contract, and to be governed by the laws of New York, is settled beyond question. *Abt v. American Trust & Savings Bank*, 159 Ill. 467.

Under the laws of New York the giving of a draft is not an assignment of the drawer's funds. *Chapman v. White*, 6 N. Y. 412.

SWIFT, CAMPBELL & JONES, attorneys for defendant in

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error, conceded that the rights of the parties must be determined by the laws of New York. What the law of the State of New York was as to the right of the parties was a question of fact. The law of New York could have been proved either by the testimony of a qualified expert, or by offering in evidence the decisions of the courts of New York on the subject, or the statutes of New York, but plaintiffs in error, in order to have the findings of the lower court on that question of fact reversed, should have preserved in the record evidence as to what the law of the State of New York was.

Defendant in error contended that under the law of New York the acceptance or certification of the check in question by defendant in error imposed upon defendant in error the obligation of paying the check, and was, so far as Schaffner & Co. were concerned, and therefore so far as the assignee is concerned (for the assignee has no greater rights than Schaffner & Co.), a payment of the check in question. Meads, Receiver, etc., v. Merchants Bank of Albany, 25 N. Y. 143; First National Bank of Jersey City v. Leach, 52 N. Y. 350; Smith v. Miller, 43 N. Y. 171; The Farmers & Mechanics Bank v. Butchers and Drovers Bank, 16 N. Y. 125; Merchants Bank v. State Bank, 10 Wall. 647; Thomson v. Bank of British North America, 82 N. Y. 1; Marine National Bank v. National City Bank, 59 N. Y. 67; Security Bank v. National Bank of the Republic, 67 N. Y. 458; Marine Bank v. National City Bank, 59 N. Y. 67; Clews v. Bank of New York, 89 N. Y. 418.

MR. JUSTICE WINDES DELIVERED THE OPINION OF THE COURT.

The question presented in this record is whether the County Court of Cook County erred in allowing defendant in error credit in an accounting with the assignee of Herman Schaffner & Co. for a check or draft of \$55,000, dated June 1, 1893, drawn by said Schaffner & Co. on defendant in error, accepted and certified on June 3, 1893, and paid June 5, 1893.

Herman Schaffner and A. G. Becker, comprising the firm

of Schaffner & Co., were private bankers in Chicago, and defendant in error was their New York depository and correspondent. Schaffner & Co. had for many years prior to June 1, 1893, done business with the National Bank of Illinois at Chicago, which cleared for Schaffner & Co., and paid their checks that came through the Chicago clearing house.

In the regular course of business between Schaffner & Co. and the National Bank of Illinois on June 1, 1893, Schaffner & Co. made their draft of that date for \$55,000, addressed to defendant in error at New York, and payable to W. A. Hammond, cashier of the National Bank of Illinois. This draft was on the same day cashed by the latter bank, that is, it gave its cashier's check to Schaffner & Co. for the draft, and having endorsed it to the Merchants National Bank of New York for collection for account of National Bank of Illinois, forwarded the same to the Merchants National Bank of New York for collection in the regular course of business.

On the same day Schaffner & Co. sent to defendant in error certain items for collection and credit to their account, aggregating \$61,936.62. These items were received through the mail by defendant in error on the morning of June 3, 1893, before ten o'clock, and credited to Schaffner & Co. before that hour on its books.

After the close of business on June 2, 1893, said Hammond heard that said Schaffner had disappeared, and thinking that Schaffner & Co. might be in financial trouble, he telegraphed to the president of the Merchants National Bank not to present the draft in the ordinary way, but to have it certified at 10 A. M. of June 3d. Between 10 and 10:15 A. M. of June 3d, the draft was presented to the paying teller of defendant in error for certification, and it was certified in the following words: "Accepted June 3, 1893, payable through the New York clearing house," and was then charged to the account of Schaffner & Co. Up to this time defendant in error had no notice of the assignment of Schaffner & Co.

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June 2, 1893, said Schaffner did disappear, and on June 3, 1893, the bank of Schaffner & Co. closed its doors and made a general assignment for the benefit of its creditors, and during the afternoon of that day that fact became known to the cashier of defendant in error, who was then at the bank in charge of its business. June 4th was Sunday, and on June 5, 1893, said draft was paid by defendant in error, which plaintiffs in error, creditors of Schaffner & Co., claim was contrary to their rights and the rights of the assignee of Schaffner & Co., because, as they say, the draft was payable through the clearing house of New York, by the bank of defendant in error situated there; that the contract was one to be performed in New York, and that the laws of New York fix the rights of the parties; that the certification of the draft created no obligation between defendant in error and the person presenting the draft, except to guarantee the genuineness thereof, and that there was so much money on hand to meet it, that defendant in error should not have paid the draft, but held the funds and accounted to the assignee of Schaffner & Co. for the same. It is conceded that under the law of Illinois, and the facts above stated, the presentation and certification of the draft operated as an assignment to the payee of the funds of Schaffner & Co. in the hands of defendant in error, to the amount of the draft, and if it were not conceded, that is the law of Illinois. *Munn v. Burch*, 25 Ill. 40; *Brown v. Leckie*, 43 Ill. 497; *National Bank of America v. Indiana Bkg. Co.*, 114 Ill. 483.

What the law of a foreign State is, in a case of this kind, must be proven like any other question of fact.

It appears from the record and abstract, that plaintiffs in error, and also defendant in error, offered and read in evidence on the trial, divers decisions of the courts of New York from different reports, giving the book and page where such decisions might be found, but both abstract and record fail to show what any of such decisions are. So far as the record is concerned, it shows that certain proof was made, but what that proof was it fails to show.

In the absence of any proof as to what the law of New York is, we must presume it is the same as the law of Illinois, which, we have seen, sustains the judgment of the County Court in allowing defendant in error credit for the draft.

But if we are to hold that the law of New York is sufficiently proven, it does not sustain the contention of plaintiffs in error that the payment of the draft was wrongfully made by defendant in error. As we have seen, the National Bank of Illinois was a *bona fide holder for value* of the draft, having taken it in the regular course of business, and paid for it by its cashier's check; that it was forwarded to New York for collection, and the day following, when it was ascertained that Schaffner & Co. were probably in financial trouble, Hammond, its cashier, telegraphed to the Merchants National Bank, to which it had been sent, to have the draft presented and certified, which was done by defendant in error, and charged to the account of Schaffner & Co. in the regular course of business, and before it had any notice whatever that Schaffner & Co. were involved financially, and before it had any notice that Schaffner & Co. had made an assignment. The certification, under this state of circumstances, made defendant in error liable to pay the amount of the draft, as it did, on June 5, 1893.

After a careful examination of the cases from New York, cited by plaintiffs in error, we are unable to see their application to the case at bar, because of the particular facts of each case distinguishing them from this case. They are all cases of checks which were raised or altered after being certified.

In the latest case cited by plaintiffs in error, being a case of a draft raised after certification (*Clews v. Bank of New York*, 89 N. Y. 418), the court says: "By the certification the drawee bank becomes responsible to pay the holder whatever is properly due upon the check, and nothing more."

In the case of *Meads v. Merchants Bank of Albany*, 25 N. Y. Rep. 146, where the bank teller had certified the check in the usual course of business, the court said, speak-

Strauss v. American Exchange Nat. Bank.

ing of the certification by the teller: "His certificate that it was good was a true representation of the state of the account of Plumb with the bank, and bound the bank to hold and retain the amount for which the check was drawn to meet it, on presentation by any person by whom it might be held. It was equivalent to the acceptance of a negotiable bill of exchange, in favor of the holder, for that amount by the bank." Citing *Farmers & Mechanics Bank of Kent Co. v. Butchers and Drovers Bank*, 16 N. Y. 128. "The defendants received this check for value."

In the case of *Thomson v. Bank of British North America*, 82 N. Y. 1, the law of New York in case of a certified check is stated by the court as follows: "Ordinarily, where the payee or holder of a check which is payable immediately, instead of demanding payment procures the check to be certified, the check is as between the drawer and holder regarded as paid, and the holder must look to the bank whose obligation it has accepted, in lieu of the money, because by procuring the certification he has caused an amount of the drawer's funds or credit, equal to that for which the check was drawn, to be set apart for the payment of that check, and withdrawn from the control of the drawer, and his funds are as effectually diminished as if the money had been paid; while the bank has given a negotiable obligation to the holder of the check, which is equivalent to a certificate of deposit. If the holder of the certified check should lose it, he would still have his remedy upon it against the bank, but could not have recourse against the drawer, whose funds had thus been locked up or transferred to the credit of another party. And even the subsequent payment of the check by the bank upon a forged endorsement, would not relieve it of its liability upon the contract it had made with the true owner, nor restore to the drawer the right to draw upon the bank for the funds which had been appropriated to the payment of the check, and were consequently no longer his." See also *First Natl. Bank of Jersey City v. Leach*, 52 N. Y. 350.

We therefore think that in the decree of the County Court there was no error, and it will be affirmed.

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175 19

Supreme Lodge and Chicago Lodge 932, Knights of Honor, v. Otto Goldberger and Fred. Goldberger for Use of Anna Beresh.

1. **BENEFICIARY SOCIETIES—*Failure to Furnish Blanks for Proof.***—Where the supreme lodge of a beneficiary association declines to furnish the necessary blanks for proofs of death to the representatives of a deceased member, and voluntarily casts upon its subordinate lodge the burden of supplying the required proofs, it in effect relieves such representatives from all obligation in that behalf; and when such burden is upon the subordinate lodge the supreme lodge can not set up as a defense the failure of the subordinate lodge to act.

2. **JUDGMENTS—*Error in Entering—How Cured.***—When an error occurs in the entry of a judgment by the trial court, against two defendants instead of against one, the Appellate Court will reverse the case and remand it to the trial court with instructions to enter the proper judgment upon the verdict.

Assumpsit, on a beneficiary certificate. Error to the Circuit Court of Cook County; the Hon. FRANCIS ADAMS, Judge, presiding. Heard in this court at the October term, 1897. Reversed and remanded with instructions. Opinion filed December 16, 1897.

ASHCRAFT & GORDON, attorneys for plaintiffs in error.

The court erred in rendering judgment against the defendants jointly, having no jurisdiction over one. The judgment being a unit should be wholly reversed. Brockman et al. v. McDonald, 16 Ill. 112.

R. D. COY and VICTOR I. ORHENSTEIN, attorneys for defendants in error.

Assuming that these were really two distinct and individual defendants, as named in the title of the case, it appears that one of them, Chicago Lodge 932, was never in court, not named in any summons, and not declared against, hence its remedy is not by writ of error to this court. Nor should the real defendant, the Supreme Lodge, be heard to complain of the alleged error, of being jointly liable on the judgment, for the reason that the alleged error in no way affects its rights. "Error without prejudice is no ground for reversal."

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Moses v. Loomis, 55 Ill. App. 342; Neufeld v. Rodeminski, 144 Ill. 83.

MR. JUSTICE SEARS DELIVERED THE OPINION OF THE COURT.

This action was brought by defendants in error against the Supreme Lodge Knights of Honor and Chicago Lodge No. 932, Knights of Honor, plaintiffs in error, upon a certificate or policy of life insurance. No summons was ever issued or served on either of the defendants and no appearance was ever entered by Chicago Lodge No. 932, Knights of Honor, one of the plaintiffs in error. The declaration as originally filed, is against the Supreme Lodge Knights of Honor and Chicago Lodge No. 932, Knights of Honor, and alleges that the Supreme Lodge Knights of Honor issued a benefit certificate on the life of Eugene Beresh for \$2,000, payable to defendants in error upon satisfactory evidence of the death of Beresh, and alleges that Beresh died on December 28, 1893. A demurrer was interposed to this declaration by the Supreme Lodge Knights of Honor, which was confessed, and afterward an amended declaration was filed alleging that the Supreme Lodge Knights of Honor issued the benefit certificate; that it maintained a branch or subordinate lodge known as Chicago Lodge No. 932, Knights of Honor, and described the benefit certificate as in the original declaration. To this declaration the Supreme Lodge Knights of Honor filed a plea of non assumpsit. On the trial the declaration was amended by inserting a copy of the benefit certificate, the plea standing to the declaration as amended. The trial resulted in verdict and judgment against plaintiffs in error.

It is contended by counsel for plaintiffs in error that the evidence is insufficient to sustain the verdict. There was a sharp conflict in the evidence as to death, but there was enough, if credited, to sustain the finding of the jury that it was the assured who died in December, 1893, at the Cook County Hospital. The records of the county hospital showed the death of a patient named Eugene Beresh upon

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December 28, 1893. A witness, O'Keefe, testified positively that he had known the assured in the year 1888; that witness and the assured had worked together for one of the street car companies; that in December, 1893, the assured was brought to the county hospital, where witness was then a patient; that witness conversed with the assured at the hospital, and that during such conversation recognition was mutual, each remembering the other as a former acquaintance; that they talked of the relatives of each, the assured inquiring as to witness' mother, and witness inquiring as to the wife and children of assured. The witness further testified to the death of assured on the 28th of that December, and that he saw him after death, and placed screens about the bed upon which the dead body was laid.

The receipt and testimony of an undertaker tended to show that the body of the patient Beresh, was removed from the county hospital to a medical college. There was other evidence of a less positive and less reliable nature tending to identify a dead body discovered at the same medical college as the body of the assured.

We think that the evidence was sufficient to warrant the finding of the jury as to the death of the assured.

It is contended that the evidence fails to show that such proofs of death as were required were made by defendants in error, before bringing suit upon the policy. It is true that the evidence is scant as to what proofs of death were made by defendants in error before bringing their suit, and, if upon all the facts disclosed it could be said that the furnishing of such proofs by defendants in error was an essential before suit, there might be grave doubt of its sufficiency. But the following letters appear in the evidence, written by an officer of plaintiff in error the Supreme Lodge, who is known as the "Supreme Reporter" of such lodge:

"St. Louis, Mo., July 21, 1894.

V. I. OHRENSTEIN, Esq., Chicago, Ill.:

Your favor of the 19th inst., with reference to the death of Eugene Beresh, is received. I can not send the papers for proofs to you. They must be sent to the lodge, as the

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law requires. When the blanks have been filled and forwarded by the lodge we will then have the affidavits to which you refer to aid the establishment of death and identity.

It has been claimed this man has been seen by various persons since the date of his alleged death. It is our desire to pay all claims as soon as we have proofs of the death and identity of the member.

(Signed) B. F. NELSON."

"St. Louis, Mo., July 28, 1894.

V. I. OHRENSTEIN:

With reference to the case of E. Beresh, I have forwarded blanks to the lodge, by whom they will be properly prepared and returned to me.

(Signed) B. F. NELSON."

By these letters the Supreme Lodge distinctly declined to furnish necessary blanks for proofs of death to the representative of defendants in error, and in effect thereby relieved defendants in error from all obligation in that behalf, and voluntarily cast upon its subordinate lodge the burden of supplying the required proofs. When such burden is upon the subordinate lodge, the Supreme Lodge can not set up as a defense the failure of the subordinate lodge to act. 4 Joyce on Insurance, Sec. 3310; Sup. Council, etc., v. Boyle, 37 N. E. Rep. 1105.

The refusal of one instruction tendered by plaintiffs in error is complained of, viz., the fifth. The abstract proposition therein contained is sufficiently stated in more proper form, as applied to the facts of the case, in instruction number four which was given.

But there is error assigned in that although one defendant, viz., the Chicago Lodge, had never been served with summons and had never appeared, yet the judgment runs against both.

This error was undoubtedly a matter of oversight, and would, beyond question, have been corrected in the trial court had the attention of the learned judge who presided there been called to the discrepancy. The judgment is a

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unit, and because of this error must be reversed ; but, inasmuch as the evidence supports the verdict as to the plaintiff in error which was in court, viz., the Supreme Lodge Knights of Honor, the Circuit Court is directed to enter judgment upon the verdict against the Supreme Lodge Knights of Honor. Reversed and remanded with instructions.

Presiding Justice ADAMS took no part in this decision.

Robert W. Day v. Charles F. Milligan.

1. FALSE REPRESENTATIONS—*As to Matters of Fact.*—If false representations are made as to matters of fact and the means of knowledge are at hand and equally available to both parties, and the purchaser, instead of resorting to them, trusts to the vendor, the law, as a general rule, will not release him from his own want of ordinary prudence. Especially so when the property is tangible, at hand, and subject to inspection.

2. NEGOTIABLE INSTRUMENTS—*Separate Defenses—Consideration.*—Section 18 of Chapter 98, R. S., entitled "Negotiable Instruments," permits three defenses, viz.: absence of consideration, failure of consideration and partial failure of consideration; these three are separate and distinct defenses and must be so pleaded. Under a plea of total failure of consideration there can not be a defense made on proof of a partial failure of consideration.

Assumpsit, on a promissory note. Error to the Circuit Court of Cook County: the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the October term, 1897. Affirmed. Opinion filed December 18, 1897.

EDGAR BRONSON TOLMAN, attorney for plaintiff in error.

Where representations relate to a material fact within the knowledge of the person making them, or which he assumes to assert upon his personal knowledge and with respect to which the person to whom the representations are made, has not the personal opportunity or ability to test or verify, the latter has a right to rely on such representations, and in the absence of facts apparent to reason-

72	824
92	564
72	824
97	1872

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ably arouse suspicion and throw doubt upon the truth of the statements, he is not bound to go further and make inquiries in respect thereof. *Endsley v. Johns*, 120 Ill. 480.

If the vendor makes misrepresentations to the vendee as to a material fact, and such misrepresentation is made knowingly, for the purpose of deception, under such circumstances as would induce a reasonably prudent man to rely upon the same, the vendor is liable for the fraud and deception practiced. *Antle v. Sexton*, 137 Ill. 410; *Nolte v. Reichelm*, 96 Ill. 425; *Hanson v. Busse*, 45 Ill. 496; *Weathervord v. Fishback*, 3 Scam. 170; *Hiner v. Richter*, 51 Ill. 299.

G. W. & J. T. KRETZINGER and M. F. GALLAGHER, attorneys for defendant in error.

An actionable false representation must be such as is calculated to deceive a person of common prudence and make him the dupe of deception. *Farwell v. Linn*, 59 Ill. App. 245.

The facts as to the false representation must be peculiarly within the knowledge of the person charged with deceit, and the means of knowledge and opportunity to verify the statement must be absent. *Hicks v. Stevens*, 121 Ill. 194.

A promissory note imports a consideration, and he who alleges a want or failure of consideration must prove it, and if a failure of consideration is relied upon the extent of that failure must be made clearly to appear. Unless the defendant who pleads failure of consideration shows exactly the amount of the failure, whether total or partial, and if partial, how much, the court can not have any credit or allow any counterclaim. *Sims v. Klein*, Breese, 302; *Stacker v. Hewitt*, 2 Ill. 207; *Topper v. Snow*, 20 Ill. 434; *Honeyman v. Jarvis*, 64 Ill. 366; *Mitchell v. Deeds*, 49 Ill. 416.

MR. PRESIDING JUSTICE ADAMS DELIVERED THE OPINION OF THE COURT.

This was a suit in assumpsit by defendant in error against plaintiff in error on a promissory note made by the latter to the former, of date January 2, 1893, and due November

1, 1893, for the sum of \$8,000, and interest. The defendant below pleaded the general issue and two special pleas. The first plea alleged, substantially, as follows: That the sole consideration of said note was the purchase of a one-eighth interest from the plaintiff in the "Hyde Park Hotel;" that at the time of the purchase of said interest and the making of said note, the plaintiff falsely, fraudulently and knowingly represented to the defendant that the hotel contained 300 rooms available to be hired to guests at an average price of \$5 per day; that fifty of said rooms had private bathrooms attached and were available to be hired to guests at an average price of \$10 per day; that the defendant relied on said representations, believed the same to be true, did not know to the contrary, and was deceived thereby, and that, in consideration of said false and fraudulent considerations, wholly relying thereon and induced thereby, he made said note as part of the purchase price of said interest in said hotel. But defendant avers that the hotel contains only 213 rooms available for hiring to guests, and that only thirty-one of said rooms had private bathrooms attached, of all which the said plaintiff, at the time of making the said false and fraudulent representations, then and there had notice, and knew the said representations to be false; that the earning capacity of the hotel was much less than it would have been had it contained 300 rooms available for guests, with fifty of said rooms having private baths attached; that if the representations had been true, the one-eighth interest so purchased would have been of great value and would have produced a profit and income, but that said hotel, because it contained only 213 rooms, did not produce a profit, but resulted in a loss of, to wit, \$7,000. Whereupon the said defendant says that the consideration of said promissory note has wholly failed.

The second special plea alleges the same facts as the first, and in addition thereto avers that the defendant's duty, in connection with the hotel, was to take charge of the correspondence with persons intending to come to the World's Fair, and to make contracts for the occupancy of rooms in the hotel; that he was wholly engrossed with his duty as

correspondent, and that with reference to the number of rooms, he relied wholly upon the statement of the plaintiff.

That the plaintiff caused to be prepared printed circulars repeating the representations above referred to, which were furnished to the defendant for use in such correspondence, and that to further carry out his plan of deception plaintiff caused to be put up in the office of said hotel an electric register purporting to contain the number of rooms in said hotel, and also a numbered card-rack purporting to contain the number of rooms in said hotel; and that in each of the cases above mentioned the number of rooms in said hotel was indicated to be as above stated, to wit, the number of 300 rooms; and did also cause all the doors in the halls of the hotel to be numbered, and that doors to the number of 300 were given as separate numbers; whereas some of said doors, which from the halls of the hotel would appear to be the doors of rooms, were doors leading to bath rooms and other rooms not available for the purpose of hiring to guests; and that none of these representations, tricks or devices of the said plaintiff were discovered to be false until the hotel nearly finished the World's Fair season, and a large loss had been made in this business, and the defendant was thereby induced to make careful and diligent search to know why said loss had occurred; in which investigation defendant discovered the facts above stated, that the hotel contained only 213 rooms, of which only thirty-one had private baths. That by reason of the facts last stated the earning capacity of the hotel was much less than it would have been with 300 rooms available for guests, and fifty with private baths attached.

That during all of the World's Fair period all the accommodations of the hotel were in demand, but the fact that the said hotel contained only 182 rooms available for hiring at \$5 a day, instead of 250 rooms, as represented by the said plaintiff, made a daily loss of \$340; and that the fact that said hotel contained only thirty-one rooms instead of fifty rooms available for hiring at \$10 a day, as represented by plaintiff, made a loss of \$190 per day; so that the gross earning capacity of said hotel for the period of six months known as

the World's Fair period, from May to November, 1893, was \$95,400 less than it would have been if the hotel had contained the number of rooms which the plaintiff represented it had; that if the representations had been true, one-eighth interest would have been of great value; but because the hotel only contained 213 rooms, the hotel resulted in a loss of \$7,000.

Wherefore defendant saith that the consideration of the said promissory note hath wholly failed.

A jury was waived and the cause submitted to the court, and the court found for the plaintiff and assessed his damages at the sum of \$7,725.42, being the amount of the note and interest, less credits to which the defendant was entitled, and rendered judgment on the finding. The note sued on was the last of a series of notes given in pursuance of the following contract:

"This agreement, made on the second day of January, 1893, between Charles F. Milligan and Robert W. Day, both of Chicago, witnesseth:

Said Milligan hereby sells and conveys to said Day one-fourth ($\frac{1}{4}$) of his one-half ($\frac{1}{2}$) interest in the hotel, known as the Hyde Park, the same being one-eighth ($\frac{1}{8}$) of the entire property, which includes all good will, lease, furniture, supplies and goods of every nature, now belonging to the firm of C. F. Milligan & Co., also cash on hand and bank account due or to become due, bills receivable, etc., for the sum of seventeen thousand (17,000) dollars, payable as follows, without interest, in notes as of even date:

January 2, 1893.....	\$ 500
March 1, 1893.....	500
May 1, 1893.....	500
June 1, 1893	1,500
July 1, 1893	1,500
August 1, 1893.....	1,500
September 1, 1893.....	1,500
October 1, 1893.....	1,500
November 1, 1893.....	8,000

\$17,000

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Said Day hereby agrees to make to the said Milligan the payments above stated and assume one-eighth ($\frac{1}{8}$) of the present liabilities of the business as shown by the books on this date.

It is further mutually agreed and understood that said Day shall have his said one-eighth ($\frac{1}{8}$) shares of all payments which have been made before this date, in advance, on account of room rent or board to be furnished hereafter.

In witness whereof the parties hereto have set their hands and seals this second day of January, A. D. 1893.

CHAS. F. MILLIGAN. (Seal.)

ROBERT W. DAY. (Seal.)"

The Hyde Park Hotel was operated under a lease, and prior to the date of the above-mentioned contract it was owned by the following named persons in the proportions mentioned: Milligan, one-half; Bliss, six-fourteenths; Holbrook, one-fourteenth. Originally Bliss had a half interest, but had sold to Holbrook the one-seventh of his interest. The hotel was conducted under the firm name of C. F. Milligan & Co., and after the sale to plaintiff in error, he, Bliss, Holbrook and Milligan were partners and the members of the firm.

The question whether Milligan, the defendant in error, represented to plaintiff in error that there were 300 guest-rooms in the hotel and that fifty of them had private bathrooms attached, was one of fact to be decided by the trial court acting as a jury. The evidence on that question was conflicting, and if the court had specially found that such representation was not made, we could not say that the finding was so manifestly contrary to the evidence that it should be set aside. Day testified to several conversations between himself and Holbrook, in which he says Holbrook told him that there were 300 rooms in the hotel, fifty of which had private baths attached, and it is claimed by counsel for plaintiff in error that Holbrook was Milligan's agent for the sale of part of his interest, and was authorized by Milligan to so state. The evidence does not support this claim, but on the contrary shows that Hol-

brook was acting as the friend of Day and in promotion of what he thought to be his own interest.

Appellant testified that he had been acquainted with plaintiff in error since 1875, was his classmate for two years at Yale, and a close friend of his, and had full confidence in his integrity and business ability. Day tells us that he first went to dine at the hotel by Mr. Holbrook's invitation, who stated to him that he was interested in the hotel and that "*they* wanted a man to take care of the procuring of guests for the hotel;" that before this he had had a conversation with Holbrook, in which he stated that an interest in the hotel could be purchased, and made a statement with regard to the number of rooms and private baths, as averred in the pleas. Holbrook testified that he talked to Milligan about "associating some one else with *us*," and mentioned Day's name, and that, finally, Milligan authorized him to offer Day one-fourth of his, Milligan's, interest for \$17,000. This was all the authority Holbrook had, so far as appears from the evidence. He had no authority whatever from Milligan to make any representations about the number of rooms or anything else. It is somewhat remarkable that although plaintiff in error rests his case on alleged misrepresentations by Milligan, he testified mainly to representations by Holbrook. All that he testified bearing on representations by Milligan, was that at the final meeting, when the terms of the sale were agreed on, "Mr. Milligan repeated, in substance, the statements, or verified the statements of Holbrook." This seems to be a conclusion of the witness. He testified specifically to what Holbrook had said, but he utterly failed to testify what Milligan said, if anything, about the number of the rooms. He did testify that Holbrook said, at that interview, "This hotel has 300 rooms; we can figure that the rooms will earn \$5 per day, and that this earning can be a net amount, because the dining room will take care of the expenses of the hotel," and turned to Milligan and asked if that was not so, and he said, yes. Holbrook further manifested his interest in plaintiff in error by endorsing all of his notes for the purchase

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money, including the note sued on, at the time of their execution and delivery to defendant in error, thus assuming a liability which deprives him of the character of a disinterested witness in the case. He testified more strongly in regard to the alleged representations by Milligan than did plaintiff in error himself. Milligan testified positively that he never told Holbrook or Day how many rooms there were in the hotel, that the question was never discussed between Holbrook and him, also that Holbrook mentioned Day to him and said he would like to get him interested in the hotel, and wanted to know if he, Milligan, would sell to Day part of his interest. The evidence, in short, with regard to the alleged misrepresentations, was such that the court, or a jury, might have found either way.

But even though the court had found from the evidence that the alleged misrepresentations were made, there is sufficient evidence to support a finding that the plaintiff in error did not wholly rely thereon, as averred in his pleas, or that the representations were not such as were calculated to deceive a person of common prudence, and, therefore, the plaintiff in error should not have relied on them.

Plaintiff in error testified that before making the contract he examined the books and knew what the hotel had earned up to the time of such examination; that he knew everything except the number of the rooms. He further testified that, about the last of February, 1893, he discovered that there were only about 213 rooms, only thirty-one or thirty-two of which had bathrooms attached, and that, almost immediately after such discovery, there was a meeting of all the partners, at which Milligan was present, and that he said nothing at that meeting about misrepresentation as to the number of rooms, nor does it appear from the evidence that he complained to Milligan of any such misrepresentation prior to the bringing of this suit. Seven of the notes given for the purchase money fell due after the time when plaintiff in error says he discovered the shortage in rooms, which he paid, without protest, from his

part of the earnings of the hotel. Some of the payments credited on the note in suit were credited from his share of the profits, but plaintiff in error says he is not certain that all were, that he may have given his check for some of them. He acted in the business from January 2, 1893, until the business was closed out in December, 1893, precisely as he would have acted if the alleged misrepresentations had not been made, or as if he placed no reliance on them, if made, and received during that time \$11,000 as his share of the profits, and \$2,300 as salary for his personal services in the business.

Plaintiff in error was at the hotel a number of times before the contract was made. At the first visit he says he saw the first floor, dining room, office and billiard room; at another time, he says that he presumes that he and Holbrook went to the second floor or further, that he thinks they went on the roof. Holbrook, who was a partner in the hotel business, says that when he introduced plaintiff in error to Milligan, which was after he had communicated to Day that Milligan would sell for \$17,000, he told Day, in Milligan's presence, that he could look over the hotel and see what it was. Milligan says that after he was introduced to Day, Holbrook had Day down to dinner, and that Holbrook took the keys from the office, and he supposes showed Day the house. It does not appear from the evidence, nor is it claimed, that Day asked Milligan to show the rooms. The only reason plaintiff in error assigns for his failure to examine the rooms is that he could not do so without disturbing the guests; but his own evidence shows conclusively that he could have ascertained the number of the rooms and private baths, without any disturbance of guests. He says that when, in the latter part of February or about the first of March, he discovered there were not 300 rooms in the hotel, he procured the plans of the building, and from them ascertained the number of rooms and private baths in the hotel. It is obvious that he might have done the same thing prior to the date of his contract.

The false representations must have been such as were

calculated to deceive a person of common prudence. *Farwell Co. v. Linn*, 59 Ill. App. 245.

"If false representations are made as to matters of fact, and the means of knowledge are at hand, and equally available to both parties, and the purchaser, instead of resorting to them, trusts to the vendor, the law, as a general rule, will not relieve him from his own want of ordinary prudence. (*Cooley on Torts*, 487.) This is the case when the property is tangible and is at hand and subject to inspection." *Hicks v. Stevens*, 121 Ill. 186.

It is alleged in the pleas that the sole consideration for the note in suit "was the purchase by the said defendant from the said plaintiff of a one-eighth interest in the hotel," and that the consideration has wholly failed.

It appears from the contract that the consideration for the purchase money, \$17,000, evidenced by nine promissory notes, was the sale to plaintiff in error of one-eighth interest in the hotel, and the evidence fails to show a total failure of consideration as pleaded.

Section 13, chapter 98 of the statute, permits three defenses, viz.: absence of consideration; total failure of consideration; partial failure of consideration; and these three are separate and distinct defenses, and must be so pleaded; so that, under a plea of total failure of consideration, there can not be a recovery on proof of partial failure. *Wadhams v. Swan*, 109 Ill. 46; *Belden v. Church*, 23 Ill. App. 473.

The utmost that plaintiff in error could claim, if anything, on the evidence, is that there was a partial failure of consideration as to the whole of the purchase money, and as nine notes were given for the purchase money, there would be in such case a partial failure as to each note; for instance, if the failure amounted to twenty per cent of the whole purchase money, the failure as to each note would be twenty per cent of the face of the note; and under a plea averring partial failure of consideration as to the whole purchase money, if it appeared that such failure of twenty per cent of the whole was equal to the amount due on the note in

suit, it would be a complete defense to the note. This is illustrated in the case of *Oertel v. Schroeder et al.*, 48 Ill. 133, relied on by counsel for plaintiff in error. In that case the defendant had purchased certain property for the sum of \$6,000. He paid \$4,000 cash and gave his note for \$2,000. There was a partial failure of consideration, part of the property sold not being merchantable, as it had been represented or warranted to be by the vendor. The maker of the note pleaded, first, a total failure of consideration, but afterward, by leave of court, filed a plea of partial failure of consideration, which was sustained on appeal.

We find no error in the refusal of propositions submitted by plaintiff in error to the trial court, to be held as law in the case. The judgment is affirmed.

WINDES, J., took no part in this decision.

Joseph C. Ficklin v. A. J. Olmsted.

1. *APPEALS—From Justice of the Peace.*—When an appeal is perfected before a justice of the peace both parties are bound to follow it up.
2. *SAME—Construction of the Statute Requiring Written Appearance.*—Section 68, chapter 79, R. S., requiring a written appearance to be filed by appellee ten days before the term, in order to give the court jurisdiction, has no application to appeals perfected before the justice.

Transcript, from a justice of the peace. Error to the Superior Court of Cook County; the Hon. NATHANIEL C. SEARS, Judge, presiding. Heard in this court at the October term, 1897. Affirmed. Opinion filed December 16, 1897.

FRANCIS M. LOWES, attorney for plaintiff in error, contended that the court has no inherent power to entertain appeals; the statute must be complied with. *Ward v. People*, 13 Ill. 635.

In support of the doctrine that before the court should act upon the motion of a party litigant or his attorney, his appearance, or the appearance of his attorney, should be filed

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with, and the fee paid to, the clerk, pursuant to the statute (Sec. 33, Chap. 53, R. S.); see *Stephen on Pleadings*, star p. 26; *Singer Manfg Co. v. May*, 86 Ill. 398; *Boyd v. Kocher*, 31 Ill. 295; *McVey v. Huott*, 11 Ill. App. 203; *Norton v. Allen*, 12 Ill. App. 592; *Odd Fellows' Benevolent Society v. Alt*, 12 Ill. App. 570; *Chicago Dredging & Dock Co. v. McCarty*, 11 Ill. App. 552; *McMullen v. Graham*, 6 Ill. App. 239; *Pratt v. Bryant*, 2 Ill. App. 314.

BARNES, BARNES & BARTELME, attorneys for defendant in error.

A transcript from a justice court once filed secures the court jurisdiction, even though such transcript be defective. *Fink v. Disbrow*, 69 Ill. 76.

A rule of the Superior Court providing for a preliminary call of the docket to ascertain cases for trial is valid, and such rule providing that if neither party answers, the case shall be dismissed for want of prosecution with *procedendo*, is valid. *Hinckley v. Dean*, 104 Ill. 630.

On the first call neither party appearing, the appeal may be dismissed, and if dismissed it will be with *procedendo*. *Elliott's Superior Court Rules*, 74, R. 20.

MR. PRESIDING JUSTICE ADAMS DELIVERED THE OPINION OF THE COURT.

The plaintiff in error appealed to the Superior Court of Cook County, from a judgment rendered against him at the suit of defendant in error by a justice of the peace April 12, 1895. The appeal was taken by filing an appeal bond in the office of the justice. A transcript of the justice's docket and the papers in the cause were filed in the office of the clerk of the Superior Court in 1895. April 30, 1896, the Superior Court dismissed the appeal for want of prosecution. The judgment of dismissal recites as follows:

"This cause being this day called for trial, and the defendant failing to prosecute his appeal, on motion of plaintiff's attorney, it is ordered that the said appeal be and is hereby dismissed," etc.

The only point made by the attorney of plaintiff in error is that no appearance or writing of defendant in error had been filed in the cause nor appearance fee paid. There may have been an appearance filed in writing for aught the court can know to the contrary from the record. Such an appearance is not required to be made a part of the record by the rules of the court, and if plaintiff in error had desired to present the question for adjudication, he should have taken such action as that it might have been preserved by bill of exceptions. Plaintiff in error, however, has lost nothing by not so acting.

When the appeal is perfected before the justice, both parties are bound to follow the appeal. *Boyd v. Kocher*, 31 Ill. 295.

In that case, the court, commenting on the section of the statute which authorizes the taking an appeal by filing a bond with the justice, say: "It is apparent from this section, when an appeal is perfected before a justice of the peace, no summons is necessary to either party. The party appealing is bound to follow up the appeal which he has himself taken, and so is the appellee, as in an appeal taken from the Circuit Court to this court."

This court has held that the section of the statute requiring a written appearance to be filed by appellee ten days before the term, in order to give the court jurisdiction, has no application to appeals perfected before the justice. *Bessey v. Ruhland*, 33 Ill. App. 73; citing *Allen v. City of Monmouth*, 37 Ill. 372, and other cases.

In the case in 33 Ill. App., *supra*, the court say: "It has never been supposed that on appeal taken by filing a bond with the justice, the appellant could not proceed, whether the appellee came or not. *Reiman v. Ater*, 88 Ill. 299; *Fix v. Quinn*, 75 Ill. 232. And, as in such case the appellee may be pushed, he may push."

When the appeal is taken before the justice, both parties must follow the appeal, and are in court, in contemplation of law. When the papers and the transcript of the justice's docket of the cause are filed in the court to which the

 Worthington v. Gross.

appeal is taken, the latter court has jurisdiction of the parties and the subject-matter, precisely as it would on service of summons on a party defendant in a case within its jurisdiction, and neither summons nor appearance in writing filed by appellee ten days before the term, is necessary to enable the court to proceed to trial or judgment of dismissal of the appeal. The adjudged cases fully support these propositions. In the present case the judgment recites that the appellee, by his attorney, moved to dismiss the appeal, which is, in effect, a recognition of the appearance of the appellee when the cause was called for trial. There is nothing in the record on which to base the objection of plaintiff in error, that the appellee (defendant in error) did not pay an appearance fee in the lower court, if this is material. The presumption, in the absence of evidence to the contrary, is that she did.

The judgment is affirmed.

72	837
112	16

Edward A. Worthington v. Samuel E. Gross.

1. **CONTRACTS—Preliminary Oral Negotiations.**—All oral negotiations and agreements between the parties, which precede the reduction of their contract to writing, will be treated as merged in the writing.

2. **LATENT DEFECTS—In the Absence of Fraud.**—In the absence of actual fraud the law will not protect a party where he has failed to exercise ordinary diligence and precaution to protect himself.

Bill for Injunction.—Appeal from the Superior Court of Cook County; the Hon. FARLIN Q. BALL, Judge, presiding. Heard in this court at the October term, 1897. Affirmed. Opinion filed December 16, 1897.

SMITH, GILBERT & KREIDLER, attorneys for appellant, contended that while the agreement of the defendant below was not in writing there was a performance by the complainant which takes the case out of the statute of frauds. He entered into possession of the premises, paid the consid-

eration in the manner agreed by executing notes for all of the deferred payments and delivering them to the defendant, and paid the taxes on the premises after 1894. There was a part performance which will take the case out of the statute of frauds. *Thornton v. Heirs of Henry*, 2 Scam. 218; *Updike v. Armstrong*, 3 Scam. 564; *Northrop v. Boone*, 66 Ill. 368; *Fitzsimmons v. Allen's Adm.*, 39 Ill. 440; *Warren v. Warren*, 105 Ill. 568.

YOUNG, MAKEEL & BRADLEY, attorneys for appellee.

In a preliminary arrangement between land owner and railroad company for grant of right of way, one of the conditions was that the company should fill up a certain sluice. The writing made to evidence the agreement omitted the condition relative to the sluice; it was held upon bill to enforce the written agreement, that no evidence could be received of the verbal contract for the filling of the sluice. *Purinton v. Northern Ill. R. R. Co.*, 46 Ill. 297; *Smith v. Price*, 39 Ill. 28.

In a bill for specific performance of a parol agreement of insurance alleged to have been made at or prior to the execution of certain papers upon the subject, modifying the terms of the contract embraced in such papers, it was held that proof of such parol agreement could not be received. *Winnesheik Ins. Co. v. Holzgrafe*, 53 Ill. 516.

Where parties reduce their contract to writing, the law presumes that the whole terms and conditions of the agreement are fully incorporated in and become part of the written instrument. *Conwell v. Springfield & N. W. R. R. Co.*, 81 Ill. 232.

Where parties have deliberately put their engagement in writing, in such terms as to import a legal obligation, without any uncertainty as to object or extent of such obligation, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, was reduced to writing, and oral testimony of a previous *colloquium* between the parties, or of conversations or declarations, at the time when it was completed, or afterward, is rejected. *Keegan v. Kinnaire*, 12 Ill. App. 484.

Where a new lease is made superseding an old lease, and embracing a remnant of the term of the old lease, testimony can not be received of an oral agreement by which rights may have arisen of matters connected with the old lease. *Hoag v. Carpenter*, 18 Ill. App. 555.

It is a well settled rule of law that all oral negotiations and agreements between parties which precede the reduction of their contract to writing, will be treated as merged in the writing, and that where a writing expresses certain things to be performed by one party, upon a consideration moving from the other, it is not competent to prove by parol, that some other thing in addition to those stated in the writing, was also and before or at the time of the making of the writing, agreed to be performed upon the same consideration. *Covel v. Benjamin*, 35 Ill. App. 297.

MR. JUSTICE WINDES DELIVERED THE OPINION OF THE COURT.

Appellant filed an original bill in the Superior Court against appellee January 26, 1897, and later an amendment thereto, on which an injunction was issued. February 27, 1897, appellee answered the bill as amended. March 17, 1897, upon motion of appellant, supported by affidavit, leave was granted by the court to file an amended bill instantler, in which it is stated that this amended bill is in lieu of all other bills and amendments. To this amended bill appellee interposed a demurrer March 22, 1897, and on the same day the court dissolved the injunction theretofore issued. Afterward appellant, by leave of the court, filed an amendment to said amended bill, and to the amended bill thus amended the court sustained the demurrer of appellee, and dismissed it for want of equity.

The bill, as last amended, alleges that appellant desired in June, 1894, to buy a dwelling house and lot of land; that appellee showed appellant certain unimproved real estate in Cook county; that it was arranged between them if appellee would erect a house on the said real estate of the character desired by appellant, he would purchase the real estate; that an agreement in writing—but what its terms and conditions

were is not alleged—was entered into between them for the purchase of said real estate, and appellant paid appellee on said purchase \$5, and when the said agreement was signed, appellant stated that “unless an agreement satisfactory to complainant for the building of a house upon said lots was arranged, he would not make the purchase;” that thereupon they proceeded to arrange the details of the agreement for the erection of a house on said real estate, and it was finally verbally agreed that appellee should erect a house and “build” a well thereon, according to certain written plans and specifications, agreed upon between them; that the price of the house and well, which was agreed on, should be added to that of the real estate; that appellant should make certain payments and perform certain agreements, and appellee should convey said premises to appellant.

It is further alleged that the house and well were “built” by appellee. The said last mentioned agreement was afterward reduced to writing and signed by appellant at the request of appellee, who then represented to appellant that said house and well were substantially completed; that appellant paid the further sum of \$295; the previous agreement, made when the first payment of \$5 was made, was surrendered by appellant to appellee at the time of signing the latter agreement for the purchase of the lot, including the house; that appellant then supposed that appellee had performed his agreement and had constructed said dwelling house and well in accordance with the terms and conditions of said plans and specifications, except in some minor and unimportant points which appellant agreed to complete, and that thereupon after executing said last mentioned agreement and certain notes evidencing the payments therein agreed to be made, appellant took possession of said house and premises, and that after he took such possession appellant found that said house and well were not “built” in accordance with said plans and specifications, setting out divers items in that regard, including lack of water in the well, leaking of the house roof, improper application of paint on outside of the house, by which it had flaked and fallen off, unfit mate-

rials used in construction of house, inferior workmanship, foundations not properly put in, and also that the plastering had become cracked and broken. It is further alleged that said defects were not patent and open to observation at the time appellant executed said agreement and took possession of said premises, but that the same, on account of said inferior workmanship and materials, have developed since; that appellant can not state that appellee knew of said defects, but that appellant informed appellee of said defects; that appellee had promised repeatedly to remedy the same, and did certain work on said well and house, but failed to remedy the defects; that appellee finally refused to do anything further, and that said defects still remain, by means whereof appellant is greatly inconvenienced and damaged to the amount of a number of hundreds of dollars.

It is also alleged that appellant, relying on appellee's promises to remedy said defects, continued to make payments of said notes as they became due until June, 1896, but he then refused to make further payments until appellee should remedy said defects; that appellee demands that appellant should pay all said notes, and has sued appellant before a justice of the peace to recover on the notes that have matured.

Appellant asked an injunction to restrain the prosecution of said suit on said matured notes, to prevent further suits on any of said notes and on the covenants of said agreement of purchase until appellee should have performed said verbal agreement for the erection of said house and the "building" of said well, or until he should have made a proper deduction to appellant from said notes, and to restrain appellee from selling or disposing of said notes, or said written contract, until he shall have complied with the terms thereof, and also for general relief.

The relief sought seems to be based upon the general proposition that it would be a fraud to allow appellee to enforce the payment of said notes, which were given pursuant to the contract of purchase of said real estate, without first complying with his verbal agreement to construct said house and well.

Appellant claims that the verbal agreement to "build" the house and well upon the lots and convey the same, was within the statute of frauds, and he can make no defense at law to the notes. This is true, being an agreement to convey lands, but after the house and well were constructed, appellant, as he claims, believing that the same was done in accordance with the plans and specifications, made the agreement of purchase of the land, which was reduced to writing and signed by both parties. This action of the parties was a merger of all former verbal negotiations and agreements between them leading up to the written agreement of purchase. The only writing which had theretofore been executed, was surrendered to appellee at the time the last written agreement was made. *Smith v. Price*, 39 Ill. 28; *Conwell v. Springfield & N. W. R. R. Co.*, 81 Ill. 232; *Kergan v. Kinnaire*, 12 App. 484; *Covel v. Benjamin*, 35 App. 297.

The law in this regard is well stated in the *Canwell* case, *supra*, in which the court said: "Where parties reduce their contract to writing, the law presumes that the whole terms and conditions of the agreement are fully incorporated in and become a part of the written instrument."

In the *Covel* case, *supra*, the court stated: "It is the well settled rule of law that all oral negotiations and agreements between parties which precede the reduction of their contract to writing, will be treated as merged in the writing."

No fraudulent act of appellee is alleged, nor that there was any mistake save that the defects alleged were not patent and open to observation at the time the written agreement was executed. It does not appear they could not have been discovered by ordinary care in the inspection of said building and well. In the absence of actual fraud on the part of appellee, in order that appellant should be protected from such defects he must have provided against them by his contract. The law does not protect him when he has failed to exercise ordinary diligence and precaution to protect himself. *Fauntleroy v. Wilcox*, 80 Ill. 477; *Bond v. Ramsey*, 89 Ill. 29; *Ladd v. Pigott*, 114 Ill. 647.

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Inasmuch as there was clearly a merger of all previous verbal agreements in the written contract, it is unnecessary to discuss the other points made by appellant as to the verbal contract being executed, and therefore not within the statute, part performance taking the verbal contract from within the statute, and multiplicity of suits.

The decree of the trial court is affirmed.

Pennsylvania Company v. Thomas A. Reidy.

72	343
599	484

1. **RAILROADS—Construction of Rules.**—The rule of a railroad company providing that "A train approaching a station where a passenger train is receiving or discharging passengers must be stopped before reaching the passenger train," applies to places used by such railroad as points at which to receive and discharge passengers.

2. **SAME—Duty of Persons About to Cross Tracks to Watch for Trains.**—In a suit against a railroad for injuries received at a crossing, it is proper to instruct the jury that it was plaintiff's duty, before crossing the track, to exercise ordinary and reasonable care in looking out for approaching trains.

3. **EVIDENCE—Plats Admitted in Evidence Should be Accurate.**—In a personal injury suit against a railroad company, a diagram or plat purporting to show the location of the tracks, a platform and other objects at and near the place where the accident occurred was admitted in evidence, although shown to be inaccurate in important particulars. *Held*, on appeal, that this action of the trial court was error.

4. **NEGLIGENCE—A Question of Fact for the Jury.**—It is not proper for a trial court, in submitting a case to a jury, to instruct that certain facts show negligence; it should allow the jury to determine from the facts in evidence whether or not there was negligence; and an instruction that certain facts constitute gross negligence is erroneous.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Cook County; the Hon. EDMUND W. BURKE, Judge, presiding. Heard in this court at the October term, 1896. Reversed and remanded. Opinion filed March 8, 1897. Rehearing allowed, and cause reheard at the March term, 1897. Reversed and remanded. Opinion filed October 21, 1897.

GEORGE WILLARD, attorney for appellant.

SETH F. CREWS, attorney for appellee.

MR. JUSTICE WINDES DELIVERED THE OPINION OF THE COURT ON REHEARING.

This case was heard and decided, the opinion being filed March 8, 1897, and a rehearing granted March 29, 1897. The case was again submitted and has been considered at the present term upon the original briefs, also petition for rehearing and answer thereto.

After a careful deliberation on the questions of negligence of appellant and contributory negligence and care of appellee, presented by the record and briefs of counsel, the court deems it unnecessary, inasmuch as there may be another trial of the case, to say more, than that upon this record they are questions of fact which should be submitted to the jury.

Appellant complains that the trial court erred in admitting in evidence a certain plat offered by appellee, which purports on its face to show the location and surroundings of the place where the injury to appellee complained of occurred. It is not claimed by appellee that this plat is any more than a reasonably correct representation of the location where the injury occurred. He admits, or it is shown by the evidence, that it was not drawn to a scale; that it contains at least two tracks which were not upon the ground at the time of the accident, and that the plat purports to show by a dotted line in red ink and the endorsement "R.'s steps," the course taken by appellee immediately preceding the time he was struck by appellant's engine. The plat gives no distances, but purports to show the location of two trains, one being appellant's train, which the evidence shows was going from fifteen to thirty miles per hour, also a platform which the plat indicates as touching certain railroad tracks, whereas the evidence shows this platform was from four or five inches to two feet from the railroad track; also gates located to the east of the scene of the accident, but what distance from the tracks, platform or moving train does not appear. It does not appear who made the plat. The only witness who testified about distances between objects shown on the plat, said he did not know the distances

between objects on the plat, and on cross-examination says the plat is not correct. Counsel for appellant objected to the introduction of this plat, and persisted in the objection after the various efforts of counsel for appellee to obviate the objections, but the court overruled it, to which ruling there was an exception.

The evidence shows that it was of the highest importance to a proper understanding by the jury of the facts immediately preceding and attending the accident, that they should have accurate information as to the relative location and distances between the railroad tracks, platform, gates, as well as of the course taken by appellee just before his injury and the place where he was injured. This information can not be gleaned from the plat, but, on the contrary, it was calculated to mislead the jury as to all these points, by reason of the fact that no distances are given, no scale is pretended to have been used, and yet the plat locates different fixed objects and a rapidly moving train, indicating their relative positions.

It was clearly error for the court to admit the plat in evidence.

It is claimed to be error that the trial court admitted in evidence a rule of appellant that "A train approaching a station where a passenger train is receiving or discharging passengers, must be stopped before reaching the passenger train," because not applicable to the circumstances of this case. We think this was not error, because two witnesses had testified that the place in question was used by appellant as a station or point to receive and discharge passengers. The rule was also admissible under the general charge of negligence made in the first count of the declaration, in connection with the evidence of the witnesses referred to. Appellant's engineer must be charged with a knowledge of its rules, and the fact, if it was a fact, as testified by two witnesses, that appellant stopped its trains at and used this platform for receiving and discharging passengers, and that, as shown by the evidence, Thirty-first street was a public street in the city, frequented by large

numbers of persons at this crossing. *Lake S. & M. S. R. R. Co. v. Bodemer*, 139 Ill. 596.

There was no error in the modification of appellant's fifteenth instruction, so that it told the jury it was plaintiff's duty before crossing appellant's track to "exercise ordinary and reasonable care in looking out for approaching trains."

Appellant's eleventh instruction was properly refused, in that it took from the jury the consideration of what weight should be given certain evidence.

Appellant's counsel in his argument makes no complaint of appellee's first instruction, although he assigns it as error. We refer to it that it may not be given on another trial. This instruction tells the jury that certain facts constitute gross negligence. It is not permissible for the trial court, in submitting a case to the jury, to instruct that certain facts are negligence, but to leave the jury to determine from the facts in evidence whether or not there was negligence. *Chicago & E. I. R. R. Co. v. O'Connor*, 119 Ill. 597; *Chicago & I. R. R. Co. v. Lane*, 130 Ill. 122 and cases.

For the errors indicated the judgment of the Circuit Court is reversed and the cause remanded.

Joseph Salomon, Adm'r, v. Jesse Holdom, Adm'r.

1. *CONTEMPT OF COURT—Duty of Court Before Commitment is Ordered.*—The courts should always jealously guard the liberties of the citizen and should shrink from depriving any one of his freedom on account of a contempt, until he has been given every reasonable opportunity of complying with the law certainly and definitely prescribed and made known to him by the orders or directions of the court.

2. *SAME—An Order of Commitment for, Held Void for Uncertainty.*—An administrator was ordered to settle his accounts by a certain day, and having failed to do so, he was directed to be imprisoned for contempt "until he shall have complied with said order or until discharged by due process of law." *Held*, that as it was impossible for said order to be complied with, the time having expired, the imprisonment might be continued indefinitely, and that the order of commitment was therefore void for uncertainty.

Salomon v. Holdom.

3. *SAME—An Order of Commitment for, Held Not Justified by the Facts.*—An administrator was ordered to settle his account by a certain day, and having failed to do so he was ruled to show cause why he should not be attached for contempt, and in response to said rule he filed a report showing receipts and disbursements and balance on hand, but did not pay over the balance to the person entitled thereto. On the same day, but whether before or after the filing of said report the record did not show, the court ordered him imprisoned for contempt. *Held*, that the order of commitment was not legally justified by the facts shown by the record, and that it was prematurely entered in that the court should have first ascertained the balance due, and ordered its payment within a reasonable time.

4. *ADMINISTRATION OF ESTATE—An Order on an Administrator to "Settle his Final Account" Construed.*—An order on an administrator to "settle his final account" should be construed in the light of the statutory provisions with regard to such settlements, and to be held to mean that the administrator file or present his account in court so that it can be considered and adjusted by the court, and when its items have been passed upon by the court and the balance determined that he then, and not until then, if the court shall so order, pay over such balance pursuant to the order of the court.

5. *SAME—Payments by Administrators to Collect.*—An undertaker's bill and a bill of a physician for treatment of a deceased person during his last illness, should not be paid by an administrator to collect, but if paid and shown to be just and reasonable, the court may allow them and give the administrator proper credit.

Contempt Proceedings.—Error to the Probate Court of Cook County; the Hon. C. C. KOHLSAAT, Judge, presiding. Heard in this court at the October term, 1897. Reversed. Opinion filed December 23, 1897.

S. P. SHOPE and DAVID J. BAKER, attorneys for plaintiff in error.

RICHARD PRENDERGAST and JESSE HOLDOM, attorneys for defendant in error.

MR. JUSTICE WINDES DELIVERED THE OPINION OF THE COURT.

Plaintiff in error, Salomon, was appointed administrator *de bonis non* to collect of the estate of George Wincox, deceased, by the Probate Court of Cook County, December 1, 1894, and qualified as such and received his letters the same day. February 11, 1897, said Probate Court appointed

defendant in error, Holdom, administrator proper of said estate, who on the same day qualified and received his letters as such administrator. Also on the same day said court further ordered that Joseph Salomon, administrator to collect, "settle his final account with said estate within ten days from this date." February 25, 1897, an order was entered extending the time five days in which to settle the final account of the administrator to collect.

March 3, 1897, on notice to said Salomon, and he being present in court, said court ordered that a rule be entered "on said administrator to collect requiring him to appear before the court on the 4th day of March, 1897, at 2:30 P. M., to show cause why he should not be attached for contempt of court in failing to comply with the order of February 11, 1897, requiring him to settle his final account, and which order was by an order of this court entered on the 25th of February, extended five days."

March 4, 1897, said Salomon filed his account as administrator to collect, and also his answer to the rule to show cause, stating that said Salomon shows to the court "that in obedience to the rule entered herein to show cause, etc., he has filed his account and asks that it be approved. And further informs the court that the filing of the same has heretofore been delayed by reason of his counsel's inability to prepare the same by reason of other engagements, and prays that said rule may be discharged."

Said account is sworn to be true and perfect by said Salomon, and shows, among other things, that he had received \$29,857.02 assets of said estate, and had paid out \$5,030.65, including \$1,000 to the administrator and \$1,750 attorney's fees, the last item "subject to the court's order," also funeral expenses and bill of physician to deceased in last illness.

Also on March 4, 1897, said Probate Court entered the following order, viz.: "This day came Joseph Salomon, administrator to collect of the estate of George Wincox, deceased, in answer to a rule issued herein on him on the 3d day of March, A. D. 1897, requiring him to be and appear before this court on the 4th day of March, A. D. 1897, at

Salomon v. Holdom.

2:30 o'clock P. M., then and there to show cause, if any he has, or can show, why he should not be attached for contempt of this court for failure to comply with the order of this court entered herein on the 11th day of February, A. D. 1897, requiring him to settle his final account with said estate, and which order was, by order of this court entered herein on the 25th day of February, A. D. 1897, extended for five days. And also came Jesse Holdom, administrator proper of the estate of said George Wincox, deceased, and also came Annie M. Smith and Sadie Applegren, heirs at law of said George Wincox, deceased, by Bulkley, Gray & More, their attorneys. And this cause coming on to be heard on said rule, and said administrator to collect failing to show cause why he should not be attached for contempt of this court for failure to comply with the order of this court entered herein on the 11th day of February, A. D. 1897, requiring him to settle his final account with said estate, and which order was, by order of this court entered herein on the 25th day of February, A. D. 1897, extended for five days.

"It is ordered that said Joseph Salomon, as administrator to collect of said estate be, and he is hereby adjudged guilty of contempt of this court. And it is further ordered that the said Joseph Salomon be attached, and that a writ of attachment be issued under the authority and seal of this court, directed to the sheriff of Cook county, Illinois, commanding him to arrest the said Joseph Salomon, administrator to collect as aforesaid, and bring him before this court forthwith to show cause, if any he has or can show, why he should not be punished for contempt of this court for failing and refusing to comply with the said order of this court, entered herein on the said 16th day of February, A. D. 1897.

"And thereupon afterward this day came the said Joseph Salomon in custody of the sheriff of Cook county, Illinois, under said writ of attachment, and showing no cause to the contrary, it is ordered by the court that he be committed to the common jail of Cook county, Illinois, there to remain until he shall have complied with said order of this court entered herein on said 11th day of February, A. D.

1897, or until discharged by due process of law, and that a warrant for that purpose issue; and the sheriff of this county is directed to take him into custody forthwith."

An appeal was prayed and allowed from this order on said Salomon giving bond.

March 10, 1897, objections to said account of said Salomon were filed in said Probate Court, and the court ordered that said account and objections be set for hearing March 18, 1897, at 10:30 A. M. March 16, 1897, so much of said order of March 4th as allowed an appeal therefrom was vacated and set aside, and on March 18, 1897, the hearing on said objections to said account was continued, because it appeared to said Probate Court that said Salomon was detained by process of law and could not therefore be present in court.

Divers errors are assigned by plaintiff in error, the substance of which are, that said order of commitment is uncertain, indefinite and incapable of being performed; that there was no act or thing done by said Salomon which could be construed as a contempt; that no hearing or opportunity for a hearing was granted to said Salomon before said order of commitment was entered, and that the Probate Court had no jurisdiction to enter said order of March 4, 1897. In the view this court has taken of this case, it seems unnecessary to consider whether or not the Probate Court had jurisdiction, or whether said Salomon was accorded the hearing which the law demands should be given every person charged with contempt before he should be punished. Conceding that there was jurisdiction, on which we express no opinion, and that said Salomon was accorded such a hearing as he was legally entitled to have, which we are inclined to think, under the proceedings shown by the record, was not given him, still, was said order of commitment justified?

The courts should always jealously guard the liberties of the citizen, and should shrink from depriving any one of his freedom until he has been given every reasonable opportunity of complying with the law certainly and definitely

Salomon v. Holdom.

prescribed and made known to him by the orders or directions of the court.

The Supreme Court, on an application for a writ of habeas corpus, in *People v. Pirfenbrink*, 96 Ill. 68, where the relator, on a proceeding for contempt for failure to comply with the orders of the court, was adjudged to stand committed to the county jail until the further order of the court, held the order to be void for uncertainty, and discharged relator. The court said: "All judgments must be specific and certain. They must determine the rights covered or the penalties imposed. They must be such as the defendant may readily understand and be capable of performing."

The order of February 11, 1897, directed Salomon to "settle his final account with said estate within ten days from this date." Later this time was extended five days. The order of commitment directs Salomon to be imprisoned until he shall have complied with said order of February 11th, or until discharged by due process of law.

The time prescribed by the order of February 11th, within which he was directed to settle his account, had expired, and also the five days' extension thereof. It was an impossibility, then, on March 4th, for Salomon to obey the order, because the time had already expired, and his imprisonment might, under the words of the order, be forever, or until discharged by due process of law. If it be said he might be released under the other clause of the order "by due process of law," that, too, is uncertain.

In *King v. James*, 5 Barn. & Alderson, 894, it was held that a commitment, "until he should be discharged by due course of law," was bad, because it was not for a time certain. This case is cited with approval in 96 Ill., *supra*, where the court held that a commitment until the further order of court, was void.

But it is unnecessary to base our decision on this uncertainty of the order in its wording, and the impossibility of performance by Salomon.

Salomon was ordered to settle his final account. Bouvier defines settle, "to adjust or ascertain; to pay," and says,

"two contracting parties are said to settle an account when they ascertain what is justly due by one to the other; when one pays the balance or debt due by him, he is said to settle such debt or balance."

Webster's International Dictionary defines settle, "to adjust, as accounts; to liquidate; to adjust differences or accounts; to balance; as to settle an account." The Century Dictionary defines settle in practically the same way. Moreover, an examination of the statutory provisions with regard to settlements, both by administrators to collect and administrators proper, shows that it is intended that when they are ordered to make settlement of their accounts, they should file with the court a statement of their receipts and disbursements; that this statement is to be examined by the court, and the balance due ascertained, which balance is to be paid over to the proper parties upon the order of the court to that effect, after demand made—in the case of administrators to collect "when legal demand is made therefor," and in case of administrators proper "within thirty days after demand made." Rev. St., Ch. 3, Secs. 17, 112 and 114.

Thus it would seem clear, using the word settle as above defined and used, and we think that is the usual or ordinarily accepted meaning when applied to an account, the order of February 11, 1897, must mean that Salomon should file or present his account in court, so that it could be considered and adjusted by the court, and after a hearing, and when its items, whether of debit or credit, had been passed upon by the court, and the balance due from him as administrator to collect had been determined, that he should then, and not until then, if the court should thereafter order, pay over, pursuant to such order of the court, such balance. How was it possible for Salomon alone to adjust his account without a hearing and consideration of its items by the court? How could he, without the assistance of the court, ascertain what was justly due from him? How could he alone fix the balance he should pay over to the administrator proper?

He was an administrator to collect. The statute, Rev. Stat. of Ill., Ch. 3, Sec. 15, says, he shall collect the goods, chattels and debts of deceased at such reasonable and necessary expense as shall be allowed by the court, and for his trouble incurred the court may allow such commission, not to exceed six per cent on the amount of the personal estate, as said court may deem just and reasonable.

Section 17 makes it his duty to deliver on demand to the administrator proper all property and money in his hands, save such commission as he may be allowed by the court.

It seems plain that the law contemplates that the court should pass upon any expense which he may, as administrator to collect, incur, as also the commission, if any, to which he may be entitled.

The record is devoid of anything showing that the Probate Court had passed upon the items of Salomon's account, filed in court in answer to the rule upon him to show cause, or that any demand was made upon him. This account has an item of \$1,000 credited to the administrator, probably for commissions. There also are other items of expenditure, such as undertaker's bill and for physician in deceased's last illness, which, while they may not be proper payments to be made by an administrator to collect, were within the power of the court to allow and credit to him if just and reasonable, or reject if improper. However, if it be said that the order of February 11th meant that Salomon should file his account, and because he failed the court held that he was in contempt for a failure to obey the order of the court, that was done. He filed the account, as his answer states, in obedience to the rule to show cause, on the same day the order of commitment was entered, and tells why he had not filed it sooner. If in fact the account and answer of Salomon were not filed before the order of commitment was made, then the record should so show, which it does not.

According to Salomon's own showing, after allowing him all his claims of credits, he has in his possession, as administrator to collect of said estate, nearly \$25,000 of assets, which

he has no just right to retain. He certainly should have shown some more willingness to do his duty as an officer of the Probate Court than is manifested by this record, and were it not that the proceedings disclosed fail to conform to the requirements of the law in essential particulars necessary to be observed in order to a proper protection of the liberty of the citizen, and a careful, conservative and orderly procedure of the courts in punishments for contempt, we would be disposed to affirm the action of the Probate Court. But we are of opinion that said order of commitment was not legally justified under the facts shown by this record; that it was prematurely entered, in that the court should have first ascertained the balance due from said Salomon and ordered him to pay the same within a reasonable time, and even if Salomon was in contempt of the court up to the time of the entry of said order, the filing of his answer and account, at that time, was a substantial compliance with the order, and it should not have been entered.

The order of said Probate Court of March 4, 1897, is reversed.

Henry Walthers v. Chicago & Northwestern Railway Company.

1. RAILROADS—*Duty to Persons Attempting to Mount Moving Trains at Other Places than Platform.*—A railroad company which has provided a reasonably safe platform near its depot, from which persons desiring to board its trains may do so safely and conveniently, has discharged its full duty in that regard, and is not bound to provide platforms at other points for the accommodation of persons who may attempt to board its trains while in motion, or to keep its right of way clear from cinders or other obstructions which may cause injury to such persons.

2. SAME—*Attempting to Mount a Moving Train, Negligence.*—Attempting to mount a moving train without the advice or consent of the railroad's agents, is negligence which will bar a recovery for injuries received in so doing.

Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in this court at the October term, 1897. Affirmed. Opinion filed December 23, 1897.

DOUTHART & GARVY, attorneys for appellant.

It is negligence to make any erection so near the track that the slightest indiscretion on the part of the trainmen may put them in danger. *Chicago B. & Q. R. R. Co. v. Gregory*, 58 Ill. 272; *Rockford, Rock Island & St. L. R. R. v. Hillmer*, 72 Ill. 235; *Dimick v. Chicago & N. W. Ry. Co.*, 80 Ill. 338; *Chicago, B. & Q. R. R. Co. v. Lee*, 87 Ill. 454.

It is for the jury to say what obstructions are unlawful. *Herring v. Woodhull*, 29 Ill. 95.

The obligation of care on the part of a railroad company, extends to all the accessories of its business, among which are stations, tracks and depots. These must be constructed and arranged, and maintained with care, properly lighted when dark, and otherwise made safe and convenient for persons lawfully entering thereon for the transaction of business. But in these as in other matters the company is only bound to use ordinary care except in favor of passengers. *Toledo, Wabash & Western R. R. v. Grush*, 67 Ill. 262.

It is negligence not to remove ice from the track. *Flynn v. Wabash, St. L. & P. R. R. Co.*, 18 Ill. App. 235.

It is negligence for a company to construct a building too near the track. *Ill. C. R. R. v. Welch*, 52 Ill. 183; *Chicago, B. & Q. R. R. v. Gregory*, 58 Ill. 272.

It is negligence to have a telegraph pole within nineteen inches of the body of a car. *Chicago & Iowa R. R. Co. v. Russell*, 91 Ill. 298.

It is gross negligence to have a structure so near a track that cars touch it in passing. *Ill. & St. Louis R. R. Co. v. Whalen*, 19 Ill. App. 116.

It is the duty of a railway company before departure of its trains from a station, to clear the way by the removal of freight trains so that passengers can approach the passenger train with safety. *Chicago & N. W. Ry. Co. v. Coss*, 73 Ill. 394.

A railroad company is liable where passengers fall from an unguarded end of a station platform. *Jarvis v. Brooklyn El. R. Co. (N. Y.)*, 30 N. E. 1150; *Pennsylvania Co. v. Marion*, 23 N. E. 973 (Ind.)

A railroad company is bound to keep in safe condition for its passengers all that part of its station and platforms and tracks where passengers are expressly or impliedly invited to go. *Keefe v. Boston & A. R. R. Co. (Mass.)*, 7 N. E. Rep. 878.

"It is the duty of every railroad company to provide a reasonably safe way of reaching and departing from their cars at all usual stations." *Wabash, St. L. & P. R. R. v. Rector*, 104 Ill. 296; *Chicago & A. R. R. Co. v. Byrum*, 153 Ill. 134.

"It is the duty of a railroad company to provide safe platforms at depots and regular stopping places so that passengers can get on its trains with safety to their persons." *Chicago & N. W. Ry. Co. v. Scates*, 90 Ill. 593.

One who attempts to board a train moving from three to four miles an hour is not guilty of negligence *per se*. *Distler v. Long Island R. R. Co.*, 45 N. E. Rep. 937.

It is not negligence *per se* for a person to get off a train in motion. *Chicago & Alton R. R. v. Byrum*, 153 Ill. 131.

A. W. PULVER, attorney for appellee; E. E. OSBORN and LLOYD W. BOWERS, of counsel.

Whether or not a passenger alighting from or getting on a moving train was guilty of such contributory negligence as would bar a recovery is a question of fact to be determined by the jury under all the attendant and surrounding circumstances. *Chicago & A. R. R. Co. v. Byrum*, 48 Ill. App. 41, affirmed in 153 Ill. 137; *Chicago & A. R. R. Co. v. Bonifield*, 104 Ill. 223; *Ill. Cent. R. R. v. Haskins*, 115 Ill. 300; *Chicago & E. I. R. R. v. O'Connor*, 119 Ill. 586; *Lake Shore & M. S. R. R. v. Brown*, 123 Ill. 162.

Where a passenger gets upon a moving train the question of defendant's negligence and plaintiff's freedom from contributory negligence are questions of fact and should be submitted to the jury. *Distler v. Long Island Ry. Co. (N. Y.)*, 45 N. E. Rep. 937.

An attempt to leave a moving train is not negligence *per se*. *Louisville & Nash. Ry. Co. v. Crunk (Ind.)*, 21 N. E. Rep. 31.

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The court properly instructed the jury for the defendant, because all the evidence introduced by the plaintiff showed that his injury was caused by his own gross negligence. *Chicago & N. W. Ry. Co. v. Scates*, 90 Ill. 586; *Cicero & P. St. Ry. Co. v. Meixner*, 160 Ill. 324; *Spannagle v. Chicago & A. R. R. Co.*, 31 Ill. App. 460; *Chicago, R. I. & P. Ry. Co. v. Koehler*, 47 Ill. App. 147; *Ohio & M. Ry. Co. v. Allender*, 47 Ill. App. 484; *Ward v. Chicago & N. W. Ry. Co.*, 165 Ill. 462; *Missouri P. R. R. Co. v. Texas & P. R. Co.*, 36 Fed. Rep. 879; *Hutchinson on Carriers*, Sec. 641; *Thompson's Carriers of Passengers*, p. 267; *Rorer on Railroads*, p. 1110; *Phillips v. Rensselaer & S. R. R. Co.*, 49 N. Y. 177; *Knight v. Pontchartrain R. R. Co.*, 23 La. Ann. 462; *Harvey v. Eastern R. R. Co.*, 116 Mass. 269; *Hunter v. C. & S. V. R. Co.*, 112 N. Y. 371, 19 N. E. Rep. 820; *Soloman v. R. R. Co.*, 103 N. Y. 437; *Weeks v. New Orleans, S. F. & L. R. Co. (La.)*, 5 So. Rep. 72; *McMurtray v. Louisville, N. O. & T. Ry. Co. (Miss.)*, 7 So. Rep. 401; *Richmond & D. R. R. Co. v. Picklesheimer (Va.)*, 10 S. E. Rep. 44.

The act of the plaintiff in error in this case was in direct violation of the statute prohibiting the boarding of moving trains, and it is elementary that a person injured while engaged in a violation of law can not recover for injuries contributed to by such act. Par. 85, Chap. 114, *Starr & Curtis' Revised Statutes*; *Chicago, R. I. & P. Ry. Co. v. Eininger*, 114 Ill. 84.

MR. PRESIDING JUSTICE ADAMS DELIVERED THE OPINION OF THE COURT.

This was an action on the case by appellant against appellee. The declaration charges negligence on the part of appellant in not providing a safe and proper way for passengers to mount its train at Waukegan, in this State; in allowing a heap of ashes and other material to accumulate at and near the way by which passengers were to approach its train, and in not keeping its platform close to its depot, but about 150 feet distant therefrom, and near to and beside a heap of ashes and other material, without a platform or other means of entering or mounting its train. At

the close of the plaintiff's evidence, the court instructed the jury to find for the defendant, which they did, and judgment was entered on the verdict.

A map or plat was introduced in evidence, drawn to the scale of forty feet to the inch, which shows the situation of the tracks, platforms, contiguous streets, etc. Next east of the depot, as shown on the plat, is a plank platform; next east of that are the north and south-bound main tracks of appellee's road; next east of these main tracks is a platform, the east side, or about one-third of which, is planking, and the remainder, or west part, gravel. This platform, measured by the scale of the plat, is over 400 feet in length. Next east of the last mentioned platform, and separated from it by a narrow strip, as is usual between a platform and the track, is a track on which trains run from Waukegan to Chicago. The east platform was about level with the top of the rail. About ten feet south of the last mentioned platform was a pile of cinders which one of the witnesses, Chris. Walther, appellant's brother, testified came from the engines when they stopped to take water. The pile of cinders or ashes is described by the witnesses as being nearly a car length long, three to five feet wide, and about two and a half to three feet high, and near the track.

Washington street, an east and west street, which the witnesses describe as a hill, runs from the city down to and across the railway tracks, just south of the depot. The north line of Washington street is coincident with the south end of the east platform last above mentioned. West of the depot and intersecting Washington street is Spring street, which runs a little east of south, and west of north, but which for the purposes of the present case may be considered a north and south street. Measured by the scale, Washington street is about eight feet wide, and the distance from the north line of the east platform to the north line of Spring street is about one hundred feet. The evidence is that the train bound for Chicago usually started from Waukegan about 6:20 or 6:25 o'clock A. M.; that on the

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morning in question, April 14, 1895, it had stood on the track, at the place where it started from, all of the previous night; that passengers took the train where it stood, and that it started at the usual time.

Appellant was a clerk in the employ of the J. V. Farwell Co. of Chicago, and had been in the habit of riding on appellee's train between Waukegan and Chicago, and usually took the 6:25 A. M. train from Waukegan. He had a commutation ticket. Appellant testified as follows:

"On the morning I was injured I was going to my work as usual. When I was about the center of the large hill there, a little way from the train, I heard the bell ring and I knew it was about time for the train to start, so it hurried me up. When I got down there the train had just started, and I went a little way south and waited until the step of the car got up to me and jumped on, got one foot up and was just in the act of swinging myself up on to the car when I struck this pile of cinders, and it dragged me under. The cinders caught my foot and threw me underneath the step of the car. I tried to roll out, but the pile of cinders was so steep I could not roll out, and something, the spring of the car, or the step, struck me and knocked me down again, and I turned over and got out, with the exception of one foot." He further testified that when the bell rang he was near the center of the hill; that he came down the south side of the street, meaning Washington street, and that the train was in motion when he got to the bottom of the hill; that he was about the east line of Spring street when the train started; also that he went along the side of the train some distance as it was moving before attempting to board it.

Chris. Walther testified on direct examination:

"I am plaintiff's brother and live at Waukegan. I was in the habit of taking the 6:20 or 6:25 train of the defendant every day for Chicago, and was with my brother when he was injured. We started that morning as usual and had almost reached the bottom of the hill when the bell rang, warning us that the train was about to start. The train

started to move before we arrived there. About the time we got there alongside the train we were probably half way between the coach, that is between the platforms. I got on the hind platform of one coach and warned him to get on the other platform, but I could not swear whether it was the third, fourth or last coach, but it could not be more than the third, possibly the second, from the front. I jumped on the train safely and ran up the stairs. He started to walk or run alongside of the train the same way the train was going, and about the time the platform back of the one I got on came along he took hold of the railing and put his left foot, and took one step with the right foot and landed in this pile of cinders. I watched him and saw him fall down on top of the cinder pile," etc.

On cross-examination, he testified as follows: "We got on the third or fourth car from the last, and I think there were five cars in the train. The train started before we got east of the east line of Spring street. I was probably thirty feet north of the south line of Washington street and my brother was ten or fifteen feet south of me. He was a little south of Washington street when he tried to get on. He got right on, though he might of taken two or three steps. I did not measure the position of the cinders, but state from the recollection of what I saw that morning. We were about the center of the hill when the bell rang; and the bell rang probably fifteen or twenty seconds before it started. We ran the moment we heard the bell."

Julius C. Bittinger testified: "It was my custom to go for a walk every morning, going down to the lake. This morning I saw the boys about the center of the hill coming down when the bell began to ring. They started to run and one of them made the train easily. Henry tried to make it. I should judge he was about the center of Washington street. The train was already in motion. Chris jumped on the train and Henry followed. He got hold and it seemed to me he was caught in the pile of cinders and thrown off."

The questions are, whether appellee was guilty of negli-

gence as charged in the declaration, and, if so, whether the appellant was guilty of negligence which contributed to the injury. Was appellee negligent in not furnishing a reasonably safe way for passengers to board its trains, or in permitting a pile of cinders or ashes to accumulate and remain ten feet south of the platform? The question of the distance of the platform from the depot is not mentioned in appellant's argument, and must, therefore, be deemed abandoned.

It appears from the evidence, and is not disputed, that the platform at the place where the train in question stood before starting, was safe and convenient for the purpose of boarding the train, and the injury to the appellant is not attributed by him, or by any of his witnesses, to any defect in the platform. His complaint is that there was a pile of cinders about ten feet south of the platform, which, while he was attempting to board the moving train, occasioned the accident. Appellee having provided a reasonably safe platform near the depot, from which persons desiring to board its train might do so safely and conveniently, had discharged its full duty in that regard. It was not incumbent on appellee to provide a platform south of the depot for the accommodation of persons who might attempt to board its trains while in motion. As said by the court in *Chicago & N. W. Ry. Co. v. Scates*, 90 Ill. 586, 593-4, "It is doubtless the duty of railroad companies to provide safe platforms at depots and regular stopping places, so that passengers can get on the trains with safety to their persons; but if a company was bound to furnish safe platforms for persons to get on a train when in motion, where must this be done? If a person has a right to get on a moving train at one place (not a station or stopping place), he has the same right anywhere along the line of the railroad, and if the company was bound to furnish platforms, the result would be that the entire track would have to be thus provided with platforms." The case in which this language was used, was a much stronger case for the plaintiff than is the present case for appellant; because in

that case the post against which the plaintiff collided, while attempting to board the moving train, was directly opposite the platform, while in the present case the obstruction complained of was ten feet south of the platform.

We are of opinion that the evidence does not tend to show that the appellee was negligent as averred in the declaration, or at all negligent. This is sufficient to dispose of the appeal, but inasmuch as counsel on both sides have elaborately discussed the question of contributory negligence on the part of appellant, we will not omit consideration of that question. Appellant's action, in attempting to board the train while it was in motion, was purely voluntary on his part. There was no invitation by any of the crew of the train for him to board it while it was moving, nor any indication by any of them that he might do so, nor is there a scintilla of evidence that any of them knew that he was so attempting. We regard the case of *C. & N. W. Ry. Co. v. Scates*, *supra*, as decisive of this case.

In *Cicero & P. Street Ry. Co. v. Meixner*, 160 Ill. 320, the court say: "This court has held in a number of cases that it is negligence for a passenger to get off a train, of which the motive power is steam, while the cars are in motion. *Illinois Central Railroad Co. v. Lutz*, 84 Ill. 598; *Ohio & Mississippi Railway Co. v. Stratton*, 78 Ill. 88; *Illinois Central Railroad Co. v. Chambers*, 71 Ill. 519; *Illinois Central Railroad Co. v. Slatton*, 54 Ill. 133; *Chicago & Alton Railroad Co. v. Randolph*, 53 Ill. 510. In *Chicago & Northwestern Railway Co. v. Scates*, 90 Ill. 586, this court said (p. 592): 'If it is to be regarded dangerous for a passenger to get off a train of cars in motion, it is likewise dangerous to get on a train when in motion. If a person is guilty of such negligence in getting off a train of cars in motion as will preclude a recovery for an injury received, upon the same principle and for the same reason a person injured in getting on a train of cars in motion, and in consequence thereof, should be regarded guilty of such negligence as will prevent a recovery.' The courts of other States have adopted the same rule, viz., that it is negligence for

a passenger to alight from a moving train of cars the motive power of which is steam." See also *Spannagle v. Chicago & A. R. R. Co.*, 31 App. 460; *Ohio & M. Ry. Co. v. Allender*, 47 Ill. 484; *Mo. Pac. R. R. Co. v. Tex. & Pac. R. R. Co. (La.)*, 36 Fed. R. 879.

In the last case the court say: "Attempting to mount a moving train, without the advice and direction of the railroad's agents, is negligence, according to all respectable authorities, text books and adjudged cases." *Phillips v. Rensselaer & S. R. R. Co.*, 49 N. Y. 177; *Hunter et al. v. Cooperstown S. V. R. R. Co.*, 112 N. Y. 371; *Harvey v. Eastern R. Co.*, 116 Mass. 269.

"The boarding or alighting from a moving railway train is generally held to be a negligent act *per se*." *Shearman & Redf. on Neg.*, 4th Ed., Sec. 101.

"Plaintiff will be chargeable with contributory negligence, if he runs the risk of an obvious and serious danger, merely to avoid inconvenience." *Ib.*, Sec. 89.

We are of the opinion that fair-minded men of ordinary intelligence, could not, from the evidence, arrive at any reasonable conclusion other than that the appellant was guilty of negligence which contributed to the injury, and that the trial court properly instructed the jury to find for the appellee.

The judgment is affirmed.

MR. JUSTICE WINDES, dissenting.

I agree with the majority of the court that this case should be affirmed because no negligence of appellee is shown, but can not assent to holding that as matter of law appellant was guilty of contributory negligence. That was a question of fact for the jury. *Cumberland Val. R. R. Co. v. Maugans*, 61 Md. 61, and cases cited; *Beach on Contrib. Neg.*, 155; *Fulks v. St. Louis & S. F. Ry. Co.*, 111 Mo. 339, and cases cited.

In the latter case the court says: "To attempt to get on or off a train in rapid motion would be an act of gross negligence; but it is generally held that the courts will not, as a matter of law, declare a person guilty of contributory

negligence who attempts to get on or off a train while it is moving slowly, especially at a platform. The question of contributory negligence in such cases is one of mixed law and fact, and should be determined by the jury, under the guide of proper instructions, in the light of all the attending circumstances. Such has been the repeated ruling of this and other courts."

In the case at bar the plaintiff testified "the train had just started" when he jumped on. On cross-examination he said: "I went along the side of the train some distance, as it was running very slow, but I don't know how slow." His brother, who got on the same train about the same time that plaintiff attempted to get on, testified: "I jumped on the train safely and ran up the stairs. He (plaintiff) started to walk or run alongside of the train the same way the train was going, and about the time the platform back of the one I got on came along, he took hold of the railing and put his left foot and took one step with the right foot, and landed in this pile of cinders."

Bittinger, a witness for plaintiff, testified: "They (plaintiff and his brother) started to run and one of them made the train easily. * * * The train was already in motion. Chris jumped on the train and Henry (the plaintiff) followed. * * * He (the plaintiff) got hold of the car and ran along with the car to get on the step, and got caught in the pile of cinders."

McCullough, a witness for plaintiff, testified: "I do not think the train was going faster than an ordinary horse car in Chicago. They slowed up at the switch about a block away to allow the switchman to get on."

It also appears that plaintiff was a young man, twenty seven years old at the time of the trial, three years after the accident, making him twenty-four years old at the time of the injury, and had been in the habit for several years previous, during the summer, of taking trains at this point.

In *Chicago & A. R. R. Co. v. Bonifield*, 104 Ill. 223, the Supreme Court, it being a case of a passenger alighting from a railway train in motion, said: "A train might be

barely in motion—moving so slowly as to be scarcely perceptible on close inspection—when to get off would be attended with no danger whatever. To hold such an act, under such circumstances, gross negligence *per se*, would find no sanction in reason or justice. It would violate the experience of all persons and be contrary to the reason of all men. * * * The value of a certain fact in evidence depends largely on the attendant circumstances. An act which is gross negligence in one case, is not in another, owing to modifying circumstances. * * * But few acts can be said to be negligent *per se*."

So it may be said in the case at bar, the plaintiff being a young man, and the train running very slowly, his act in getting on the train might not be negligent *per se*, while it would have been such in the case of a person incumbered by baggage, or of an old or infirm person, or in one not in the habit of taking railroad trains. The minds of reasonably fair-minded persons might differ as to whether he was negligent or not. Illinois C. R. R. Co. v. Able, 59 Ill. 131; Illinois C. R. R. Co. v. Haskins, 115 Ill. 300; Chicago & E. I. R. R. Co. v. O'Connor, 119 Ill. 597; Lake S. & M. S. R. R. Co. v. Brown, 123 Ill. 174; Chicago & A. R. R. Co. v. Byrum, 153 Ill. 137.

In the Byrum case appellee, a *woman*, stepped from a slowly moving railway train which had gone about forty feet, was injured, and recovered. The Supreme Court said: "Whether or not appellee was guilty of such contributory negligence in alighting from a moving train as would bar a recovery, was a question of fact to be determined by the jury under all the attendant and surrounding circumstances."

While I am inclined to the view that under all the circumstances in evidence, the plaintiff, as a matter of fact, was negligent, still I think that in the first instance at least, the question was one for a jury, and not the court.

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**The Singer & Talcott Stone Company v. Dillon B.
Hutchinson et al.**

1. **CORPORATIONS—Recovery of Judgment Against, Does Not Estop Judgment Creditor from Pleading Nul Tiel Corporation.**—It is not essential to the maintenance of a suit and recovery of judgment therein against a corporation by its corporate name that it should be a corporation *de jure* for the purposes of its organization, but only that it have a corporate capacity to be sued and to defend, from which it follows that the recovery of judgment against a corporation does not estop the judgment creditor from pleading *nul tiel corporation* to a writ of error prosecuted to reverse such judgment.

2. **WRITS OF ERROR—Are New Suits.**—The suing out of a writ of error is the commencement of a new suit, and after its charter has expired and the time allowed by law in which to bring suits has elapsed, a corporation has no right to sue out a writ of error.

Assumpsit.—Error to the Superior Court of Cook County; the Hon. ARTHUR H. CHETLAIN, Judge, presiding. Heard in this court at the October term, 1897. Writ of error dismissed. Opinion filed December 23, 1897.

IRA W. & C. C. BUELL, attorneys for plaintiff in error.

T. A. MORAN, and BARNUM, HUMPHREY & BARNUM, attorneys for defendants in error.

MR. PRESIDING JUSTICE ADAMS DELIVERED THE OPINION OF THE COURT.

This is a writ of error to reverse a judgment secured by the defendants against the plaintiff. The record was filed here, and the writ sued out September 8, 1897. The defendants have filed a plea which, omitting the title, etc., is as follows:

“And the defendants in error, Dillon B. Hutchinson and William W. Post, by Thomas A. Moran and Barnum, Humphrey and Barnum, their attorneys, come and defend the wrong and injury, when, etc., and say that the plaintiff in error ought not to have the aforesaid action, by writ of error herein, against these defendants, because they say

that there is not, nor was, at the time of the commencement of this suit, nor for two years prior thereto, any such corporation as Singer and Talcott Stone Company; and of this the said defendants in error put themselves upon the country," etc.

Plaintiff has demurred to the plea, claiming that the defendants are estopped by the record to say that plaintiff is not a corporation. Plaintiff claims that the defendants are estopped because it appears by the record that, in the trial court, the defendants here sued the present plaintiff and recovered judgment against it, as a corporation. This proposition necessarily assumes that to entitle the defendants to so sue and recover judgment against the plaintiff, it was essential that the plaintiff, at the times respectively when it was sued and judgment recovered, should have been a corporation *de jure* for the purposes of its organization, and not merely a corporation for the purpose of the enforcement of remedies against it, because, manifestly, if this was not essential, such suit and recovery were not, nor was either of them, in law, an admission that plaintiff was such corporation *de jure*, and the defendants are not estopped as claimed. The question therefore is, whether it was essential, to entitle defendants to sue and recover, that the plaintiff should have been a corporation *de jure* at the times, respectively, of the suit and recovery. The record shows that the plaintiff was incorporated under and by virtue of an act entitled "An act to authorize the formation of corporations for manufacturing, mining and mechanical purposes," in force February 18, 1857 (Sess. Laws 1857, p. 161); that, by the certificate executed and acknowledged under section 1 of that act, its corporate existence was limited to twenty years from the date of the license authorized by section 3 of the act, and that the date of the license was April 20, 1872. Therefore, the corporate existence of plaintiff expired April 20, 1892.

It also appears from the record that the plaintiff in error moved in arrest of judgment, in the trial court, on the express ground that its charter expired by limitation April 20, 1892,

and the ninth assignment of error here is, that the trial court erred in overruling the motion for arrest of judgment, proof having been made that plaintiff's charter had expired, and that, before the commencement of the suit against it by defendants, it was civilly and legally dead.

In 1869 an act was passed entitled, "An act to amend an act entitled 'Abatements,' approved March, 1845, and to extend the time for closing up the affairs of corporations," in force March 24, 1869, (Sess. Laws 1869, p. 1.) sections 1, 2 and 3 of which are as follows :

"Section 1. Be it enacted by the people of the State of Illinois, represented in the General Assembly: That all corporations created by special acts or under general laws, and whose charters or acts of incorporation may have expired for any reason whatever, shall continue their corporate capacity during the term of two years for the sole purpose of collecting the debts due to said corporation, selling and conveying the property and estate thereof.

Section 2. The said companies shall use the name of their respective corporations for the purpose aforesaid, and shall be capable of prosecuting and defending all suits at law or in equity.

Section 3. The dissolution, for any cause whatever, of any company created as aforesaid, shall not take away or impair any remedy given against such corporation, its stockholders or officers, for any liabilities incurred previous to its dissolution."

By virtue of section 1 of the act the corporate capacity of plaintiff, for the sole purpose of collecting any debts due to it, and for selling and conveying its property, was continued for two years, or until April 20, 1894, and during that time it was authorized by section 2 of the act to prosecute suits for the purpose mentioned in section 1.

By section 3 it is expressly provided that the dissolution of the corporation shall not impair or take away any remedy against the corporation, its stockholders or officers, for any liabilities incurred before its dissolution. By necessary implication, if not by the express words of section 3 of the

act, the plaintiff was authorized to defend any suits brought against it at any time after its dissolution for liabilities incurred before such dissolution. There is no limitation in the act to the bringing of suits against it, and none existed save such as are prescribed by the statute of limitations. It is not true, therefore, as assumed by counsel for plaintiff, that it was essential, to maintain the suit and recover judgment against the plaintiff by its corporate name, that it should have been a corporation *de jure* for the purposes of its organization, but only that it had a corporate capacity to be sued and to defend, from which it necessarily follows that the suing it and the recovery of judgment against it, as a corporation, do not estop the defendants to plead *nul tiel corporation*.

Counsel refer to sections 11 and 12 of the act of 1872, which, although they contain substantially the same provisions as the act of 1869, are not applicable to plaintiff, because their application is expressly limited by section 10 of the act of 1872 to corporations organized under that act, and plaintiff was organized under the act of 1857. 1 Starr & Cur. Stat., p. 1006, Sec. 10. By the act of 1869 the plaintiff was limited to two years from and after the expiration of its charter, or until April 20, 1894, in which to bring suits, notwithstanding which limitation it contends by its counsel that it had lawful right to sue out this writ of error September 8, 1897.

That the suing out a writ of error is a suit, is the settled law of this State. *Life Ass'n of Am. v. Fassett*, 102 Ill. 315, 329, 330; *International Bank v. Jenkins*, 107 Ill. 291; *McIntyre v. Sholty et al.*, 139 Ill. 171. In *International Bank v. Jenkins*, *supra*, the court say of a writ of error, "It must be that if it is a suit for one purpose it is a suit for all purposes," and counsel for the plaintiff here say that this language of the court was mere *obiter dictum*. In this we can not agree with counsel. The case was error to reverse a judgment of the Appellate Court in *Jenkins v. International Bank*, 9 Ill. App. 451, and in the latter case the court, McAllister, J., delivering the opinion,

says, "A writ of error, then, is in the nature of a suit or action when it is to restore the party who obtains it to the possession of anything which is withheld from him, not when its operation is entirely defensive," and the case was decided by the Appellate Court on the express ground, among others, that the suing out the writ of error by Jenkins was entirely defensive, and so not within the meaning of a statute limiting suits to two years. Therefore the statement of the Supreme Court that "if a writ of error is a suit for one purpose it is for all purposes," was not *obiter dictum*, but strictly relevant to the case before the court. This is also apparent from the brief of counsel for plaintiff in error in that case.

The demurrer to defendants' plea is overruled, and the plaintiff electing to abide by its demurrer, the writ of error is dismissed.

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Vaclav Hermanek v. Sigmund Guthmann et al.

1. CONSTRUCTION—*Of Statutes*.—It is a rule of construction that one part of a statute must be so construed by another that the whole may, if possible, stand.

2. JURIES—*Sec. 12 of Art. 18 of the Act of 1895, in Regard to Justices and Constables, Construed*.—The word "jury" as used in Sec. 12 of Art. 18 of "An act to revise the law in relation to justices of the peace and constables," in force July 1, 1895, does not necessarily mean a jury of twelve men, but must be construed to mean such a jury as is authorized by Sec. 18 of Art. 5 of the same act.

Trespass, for false imprisonment. Error to the Circuit Court of Cook County; the Hon. THOS. G. WINDES, Judge, presiding. Heard in this court at the October term, 1897. Affirmed. Opinion filed December 28, 1897.

GEO. G. BELLOW, attorney for plaintiff in error.

HINER & WATERS, attorneys for defendants in error;
BAYLEY & WEBSTER, of counsel.

Hermanek v. Guthmann.

MR. PRESIDING JUSTICE ADAMS DELIVERED THE OPINION OF THE COURT.

This was an action of trespass for false imprisonment by plaintiff in error against defendants in error. The plaintiff was imprisoned for non-payment of a judgment, rendered by a justice of the peace on the verdict of a jury of six men. The defendants pleaded specially, and the plaintiff demurred to the plea. The court overruled the demurrer, and the plaintiff electing to abide by his demurrer, the court gave judgment for the defendants on the plea. To reverse this judgment this writ of error was sued out.

The principal question of law raised by the demurrer to the plea is whether the word "jury" as used in Sec. 12 of Art. 18 of "An act to revise the law in relation to justices of the peace and constables," in force July 1, 1895, is to be interpreted or understood as necessarily meaning a jury of twelve men. Counsel for plaintiff, in his argument, expressly waives all other questions which may be raised by the demurrer, saying: "The causes for special demurrer were enough to defeat the plea, but as to those matters we care not. The main question, and the one on which we rest, is as to the trial by jury, and it was this question which was discussed at length in the court below, and on which the plaintiff relied, and it is the question on which we desire the court to pass."

An act entitled "An act to provide a trial by jury in all cases where a judgment may be satisfied by imprisonment," in force July 1, 1893, is as follows:

"Sec. 1. Be it enacted by the people of the State of Illinois, represented in the General Assembly: That no person shall be imprisoned for non-payment of a fine or a judgment in any civil, criminal, *quasi* criminal or *qui tam* action, except upon conviction by jury: Provided, that the defendant or defendants in any such action, may waive a jury trial by executing a formal waiver in writing. And provided further, that this provision shall not be construed to apply to fines inflicted for contempt of court: And provided further, that when such waiver of jury is made,

imprisonment may follow judgment of the court without conviction by a jury." 1 S. & C. Stat., p. 1410, Ch. 36, par. 531.

Section 12 of Art. 18 of the act first above referred to, is as follows:

"Sec. 12. No person shall be imprisoned for non-payment of a fine or a judgment in any civil, criminal, *quasi* criminal, or *qui tam* action, except upon conviction by a jury: Provided, that the defendant or defendants in any such action may waive a jury trial by executing a formal waiver in writing; and when such waiver of jury is made, imprisonment may follow the judgment of the court without conviction by the jury. This section shall not apply to fines inflicted for contempt of court." 2 S. & C. Stat., p. 2464, Ch. 79, par. 175.

It will be observed that sections 1 and 12, above quoted, are substantially the same, the difference being merely formal.

Section 2 of Chapter 131 of the Revised Statutes, is as follows: "The provisions of any statute, so far as they are the same as those of any former statute, shall be construed as a continuation of such prior provisions, and not as a new enactment." 3 S. & C. Stat., p. 3837.

Counsel for plaintiff contends, first, that the word "jury," as used in the act of 1893, must be understood as meaning a jury of twelve men, the word "jury" having that fixed and well understood meaning at common law; and, secondly, that the act of 1893, having been incorporated in the act of 1895, with regard to justices and constables, can not be regarded as a new enactment, and must, therefore, have the same interpretation as it would have if not so incorporated. There has been no judicial interpretation of the word "jury," as used in the act of 1893, so that the rule that when a section of a law has been judicially construed such construction will follow it when incorporated in a subsequent law, has no application. Counsel for plaintiff assumes that the word "jury," as used in the act of 1893, necessarily means a jury of twelve men, and must be so understood. This we are

not prepared to concede. When the act of 1893 was passed, there were, and now are, cases within the jurisdiction of a justice of the peace, judgments in which may be satisfied by imprisonment, and the act of 1893 applied as well to cases of the character mentioned in the act, within the jurisdiction of justices of the peace, as to cases not within their jurisdiction, and triable only in a court of record. The act, therefore, applying to two classes of cases, the one class within the jurisdiction of a justice of the peace, and the other not, the question is whether the Legislature intended by the act of 1893, that in a case such as is described in the act, within the jurisdiction of a justice of the peace, and tried before a justice, there must be a conviction by a jury of twelve men, to warrant imprisonment for non-payment of the fine or judgment following conviction. At common law justices of the peace were mere conservators of the peace, and might inquire in regard to felonies and misdemeanors, but there were no jury trials before them. 1 Bl. Com. 349 *et seq.*

The Constitution of 1818 of this State, Art. 8, Sec. 12, provided: "That the right of trial by jury shall remain inviolate." Under that Constitution a jury of six men in justice's courts was authorized by statute. Rev. Stat. 1845, p. 321, Sec. 44.

The Constitution of 1848, Art. 13, Sec. 6, contained, substantially, the same provision as the former Constitution, and the same statute was continued in force under the Constitution of 1848. 1 People's Stat., 1856, p. 68, Sec. 4.

It thus appears that prior to 1870, when the present Constitution was adopted, it was familiar law that in justices' courts a jury of six men might be a lawful jury.

Sec. 5 of Art. 2 of the Constitution of 1870 is as follows:

"The right of trial by jury, as heretofore enjoyed, shall remain inviolate, but the trial of civil cases before justices of the peace by a jury of less than twelve men may be authorized by law.

Sec. 13 of the same article provides as follows: "Private property shall not be taken or damaged for public use with-

out just compensation. Such compensation, when not made by the State, shall be ascertained by a jury, as shall be prescribed by law."

In *McManus v. McDonough et al.*, 107 Ill. 95, the court held that the word "jury," as used in the section last quoted, does not necessarily mean a jury of twelve men in all cases. The case involved the ascertainment of the compensation to be paid to the owners of land proposed to be taken for a public road. Section 44 of the road law authorized an ascertainment of such compensation by a jury of six persons. The compensation was thus ascertained, and *McManus* appealed. It was specifically urged in support of the appeal, that the word jury in Sec. 13, Art. 2, of the Constitution, means a common law jury. *Ib.* 97. But the court held otherwise, saying :

"It is true the 13th section of article 2 provides that compensation for property taken or damaged for public use shall be ascertained by a jury, but it does not specify the number of which it shall be composed. The same article, by section 5, as we have seen, has recognized a jury of less than twelve men in the trial of civil cases tried before a justice of the peace. We then have two juries specified by that article, one of less than twelve men, in trials before a justice of the peace, and twelve in other judicial tribunals. The first clause of section 5 manifestly refers to a jury composed of twelve men as the general rule, but the latter clause makes an exception to the rule by expressly authorizing a smaller number in civil cases before justices of the peace, and we must suppose the framers of the 13th section used the term to embrace all cases specified in the 5th section. Had they not, they surely would have limited the term to one or the other of the provisions of the 5th section."

In the present case the act of 1893 contemplated, as heretofore stated, both cases within the jurisdiction of a justice of the peace, and cases beyond such jurisdiction; and prior to the passage of that act, and at the date of its passage, a jury of six persons, in trials before justices, was authorized

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by law, and the legislature may well be presumed to have passed the act of 1893 with reference to such prior legislation.

McManus v. McDonough, *supra*, is decisive that the word "jury," when used in a statute, is not, in this State at least, always to be understood as exclusively meaning a jury of twelve men.

It is a familiar rule of construction that "one part of a statute must be construed by another that the whole may, if possible, stand." 1 Bl. Com. 89.

In Williams v. The People, 17 Brad. 274, the court, McAllister, J., delivering the opinion, state the rule thus: "It is a rule of law, as well as of common sense, that in construing a statute, the court is required to carefully look at and consider all its provisions, and to so construe it that all its several parts may stand, and each have some effect given to it, if possible."

Section 13, Art. 5, of the act of 1895, in relation to justices and constables, is as follows:

"Section 13. In all cases of trial before a justice of the peace, either party may have the cause tried by a jury, if he shall so demand before the trial is entered upon, and will first pay the fees of the jurors. The number of jurors shall be six or any greater number not exceeding twelve, as either party may desire." 2 S. & C. Stat., C. 70, par. 49.

By the terms of this section the jury is to be six in all cases, unless one of the parties may request a greater number not exceeding twelve. There is no inconsistency or repugnance between this section and the subsequent section 12 of Art. 18 of the same statute. The latter section, therefore, must be construed as meaning a jury such as is described in the prior action, viz., of six men, except when one of the parties may request a greater number not exceeding twelve.

We are of opinion that such was the intention of the Legislature.

The judgment will be affirmed.

Judge WINDES took no part in this decision.

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M. McDonough v. The People etc., for Use, etc.

1. **REPLEVIN**—*Action on Bond Accrues When Judgment is Rendered.*—An officer may be sued for taking an insufficient replevin bond at any time after the determination of the replevin suit and award of retorno habendo, and within three years and not afterward. The statute of limitations begins to run when the writ of return is awarded and not when it is returned.

Transcript, from a justice of the peace. Appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in this court at the October term, 1897. Reversed. Opinion filed December 16, 1897.

BULKLEY, GRAY & MORE, attorneys for appellant.

H. H. REED, attorney for appellee.

MR. JUSTICE WINDES DELIVERED THE OPINION OF THE COURT.

This was an action before a justice of the peace against a constable for taking an insufficient replevin bond. The defendant pleaded the statute of limitations before the justice, which plea was sustained, and plaintiff appealed to the Circuit Court, where a trial before the court, without a jury, resulted in a judgment against defendant for \$131.60, from which this appeal is prosecuted.

In the view we take of the questions presented, it only seems necessary to consider that presented by the defense of the statute of limitations.

Secs. 12 and 13, Ch. 119, Rev. Stat. of Illinois, are as follows:

“Sec. 12. Officer's failure to take or return bond—Liability.—If the sheriff, constable or other officer fails to take and return the bond, as required by this act, or returns an insufficient bond, he shall be liable to the party injured for all damages he may sustain by reason of such neglect which may be recovered in an action on the case, in any court of competent jurisdiction, or by an action upon his official bond.

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Sec. 13. Limitation.—No sheriff, constable or other officer shall be liable under the preceding section, unless the bond was insufficient when taken, nor unless suit is commenced against him, or upon his bond, *within three years* after the cause of action shall have accrued.”

In a replevin suit instituted by one Queeny against Mrs. Fannie C. Perkins before a justice of the peace, for the recovery of certain goods and chattels, appellant, as a constable, seized the same, took and approved the bond in question on April 15, 1893, and on the same day delivered said goods and chattels to said Queeny. This case being called for trial on May 2, 1893, said Queeny took a nonsuit, and a writ of retorno habendo was awarded, but was not issued until October 28, 1893, which was returned by a constable, viz.: “Having made demand on the within named defendant, to surrender to me the within described property, which he refused to do, I therefore return this writ, the within described property not found in my county, this 1st day of December, 1893.

GEO. W. FRANKLIN, Constable.”

The suit at bar was instituted before the justice November 10, 1896—more than three years after the award of the writ of retorno, and more than three years after its issue, but within the time of the return thereof.

It seems plain, upon principle, that this cause of action accrued on April 15, 1893, when the replevin bond was taken. The statute says that the officer shall not be liable “unless the bond was insufficient when taken,” nor “unless the suit is commenced against him or upon his bond within three years after the cause of action accrued.” If the bond was insufficient when taken, and that is appellee’s contention, then the constable could have been sued as soon as he approved it and turned over the property to Queeny, and the injured party could have recovered at least nominal damages, but as the statute contemplates a recovery of all damages that may be sustained by reason of the officer’s neglect, and as the authorities are not uniform on this point, it being unnecessary in this case, we do not decide

the point. But if this is not so, at least he could have been sued when the replevin suit was ended, May 2, 1893, and retorno awarded. *Pearce v. Humphreys*, 14 Ser. & Raw. (Penn.) 23; *Oxley v. Cowperthwaite*, 1 Dall. 349; *Manning v. Pierce*, 2 Scam. 4; *Peck v. Wilson*, 22 Ill. 205; *Petrie v. Fisher*, 43 Ill. 442.

In the *Pearce* case, *supra*, the court, basing its ruling on the *Oxley* case, *supra*, held that the sheriff was liable at the termination of the action in replevin for taking insufficient sureties, it being contended that the liability was only as of the time of taking them, but remarked upon the hardship of such a rule on the sheriff.

The Illinois cases above cited hold that a sheriff may be sued on a replevin bond taken by him at the determination of the replevin suit and award of retorno habendo.

The judgment of the Circuit Court is reversed.

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**Alexander S. Maltman v. Chicago, Milwaukee & St.
Paul R. R. Co.**

1. *ESTOPPEL—Of Railroad to Deny that Land Used by Permission of a City is a Public Street.*—Where a railroad company has applied for and obtained leave to lay its tracks upon a given strip of land, as a street of a municipality, by application to the municipality within the boundaries of which the said strip lies, and has laid its tracks pursuant to the permission of such municipality granted upon such application, it can not be permitted afterward, and while it continues to maintain such possession by reason of such permission, and without other title, to deny that the said strip was, at the time its possession was taken, a street or part thereof, in an action by an abutting property owner to recover damages for injuries claimed to result from laying such track in such street.

2. *ROADS—When Proof of Existence of, Necessary in Suit for Injury to Property by Obstruction of.*—If a plaintiff alleges in his declaration that he owns property abutting on a road, that such road affords access to and egress from his property, and that the defendant has taken possession of said road or part thereof, and thereby damaged such property, he makes the existence of the road material and should prove it in order to entitle him to a recovery.

Maltman v. C., M. & St. P. R. R. Co.

Trespass, for injuries to real estate. Appeal from the Superior Court of Cook County; the Hon. NATHANIEL C. SEARS, Judge, presiding. Heard in this court at the October term, 1897. Reversed and remanded. Opinion filed December 16, 1897.

WILSON, MOORE & McILVAINE, attorneys for appellant.

CHARLES B. KEELER & E. PARMALEE PRENTICE, attorneys for appellee; GEO. R. PECK, of counsel.

MR. JUSTICE WINDES DELIVERED THE OPINION OF THE COURT.

Appellant brought this action to recover from appellee damages which he claims to have sustained as owner of sixteen lots fronting on what is known as Bloomingdale road, upon which road appellee has built and is operating its railroad. This suit has been tried twice. On the first trial the case was taken from the jury by the court, and judgment rendered for appellee, which judgment was reversed for the reason that the record disclosed a conflict of evidence on alleged matters of fact which should have been submitted to the jury. 41 Ill. App. 229. On the second trial, a jury having been waived, the court found the issues for appellee and rendered judgment in its favor, from which this appeal is prosecuted.

The record and abstracts are voluminous and the briefs of counsel exhaustive in the discussion of the questions presented, but after a careful consideration of the same we think it necessary to enter into a review of but one question of law presented. In the year 1857 the locality where the lots are situated was a rural community, a part of the town of West Chicago, outside the limits of the city of Chicago, but sparsely settled, although a subdivision of the lots in question, with other property, had been made and recorded in 1854, known as Pierce's addition to Holstein. The west line of this subdivision is the west line of section 31, township 40 north, range 14, and the south line of the subdivision is the north line of the south $\frac{1}{2}$ of the southwest $\frac{1}{4}$ of the same section. The subdivision shows lots, blocks, avenues, streets and alleys, and, among others, Bloomingdale road, of

the width of thirty-three feet, extending east from Western avenue past Rosebud avenue, to Milwaukee avenue, a distance of nearly one quarter of a mile. The appearance of Bloomingdale road on the plat would indicate it was the intention of the maker to dedicate thirty-three feet for the purpose of a street, the other half of which should be made up from lands to the south of the quarter section line, which would be in the center of the road.

At this time, 1857, Milwaukee avenue was a toll-road and thoroughfare of travel for the public; Western avenue was also a public street, but not traveled a great deal, and Bloomingdale road was used somewhat by the public, but a fence of posts and boards extended along the quarter section line from Western avenue to Milwaukee avenue, and thence in a southeasterly direction along the southerly line of this avenue, and with other fences inclosed a tract of some twenty-three acres, the legal title of which was in a trustee for the use of Mrs. Emeline Castle, the wife of Edward H. Castle. Mrs. Castle and her husband then resided at what was known as the Bull's Head Tavern, within this inclosure on Milwaukee avenue, near its intersection with Bloomingdale road. The title to this twenty-three acres passed in 1862, to one Isham, in whom it remained until his death in 1865, when it passed to his heirs, in whom it remained until after the commencement of this suit, subject to the public right as hereinafter stated. Isham and his heirs all resided in New York City, but had agents in Chicago who looked after this property for them, and rented it from time to time.

During the year 1857, August Steinhaus, who was then one of the highway commissioners of the town of West Chicago, was employed and paid by the town to ditch and grade certain streets of the town, among others said Bloomingdale road. He ditched and graded this road during the year 1857. While engaged at this work, Steinhaus—with the consent of said Edward H. Castle, whom Mrs. Castle testified always attended to her business affairs and had charge of what was done upon her property, and that mat-

ters as to what should be done with the land were generally left to him—moved said fence from the quarter section line to a point which the preponderance of the evidence shows was about thirty feet south from the quarter section line. Mrs. Castle also says she never gave her consent to the moving of this fence, and says she didn't know that it had been moved.

No other improvement of this road appears to have been made after 1857 and up to the year 1886, when the second railroad track was laid, as hereinafter stated, but it was used continuously as a highway, as graded by Steinhaus, from the year 1857 up to 1886, except that the travel was somewhat obstructed by the building of the first railroad track about the year 1872, as hereinafter stated.

The fence, as located by Steinhaus when he moved it in 1857, remained in that position from the east line of Western avenue to the westerly line of Milwaukee avenue, until the year 1890, when it was located definitely, by the survey of the witness Martin Draths, at about thirty feet south of the quarter section line. There is quite a conflict in the evidence as to the location of this fence at different times from the year 1857 down to 1886, but from a careful examination of all the evidence, we think its clear preponderance establishes the conclusion above stated.

In 1863 the city limits of Chicago were extended to Western avenue, and in 1872 the city passed an ordinance by which the appellee, through its lessor, the Chicago & Pacific R. R. Co., was allowed to construct and maintain a railroad with single and double tracks, commencing at the Western city limits at Bloomingdale road (or street), thence on said Bloomingdale road to and across Coventry street, more than one mile to the east of Western avenue. Pursuant to this ordinance, appellee's lessor, as a part of its railroad, built a track in 1872 along said Bloomingdale road, east from Western avenue to and across Milwaukee avenue, opposite the said lots, within the thirty-three feet shown as Bloomingdale road on the plat of said Pierce's addition, and very near the quarter section line. This track was

used for railroad purposes from that time up to 1886, when it was moved slightly north, at some points between Western avenue and Milwaukee avenue, and at other points between said avenues slightly south, and a second track was laid by appellee, all being done pursuant to the same ordinance, and under a special permit for that purpose granted by the commissioner of public works of the city of Chicago, on the application of appellee's lessor and for appellee's use and benefit. The application made to the commissioner of public works requests a permit to lay down and operate a double track from the Western limits of the city on Bloomingdale road to and across Coventry street, "as shown on accompanying tracing." The tracing shows double tracks along Bloomingdale road between Western and Milwaukee avenues, the quarter section line being about midway between the north and south rails of the respective tracks, but it fails to show any southern boundary for the road.

The permit issued on the application is to lay down and operate an additional track "on and along Bloomingdale road from the western limits of the city of Chicago to and across Coventry street," and states that "This permit is granted upon the express condition that the present track is to be thrown over the necessary distance and the proposed track shall be laid alongside of present track, so that the double track, when completed, shall occupy as nearly as practicable the centre of said Bloomingdale road as shown in red lines on plat on file in this office, and further, that said railroad company shall lay down and maintain said tracks in a manner satisfactory to the commissioner of public works;" also, that "All work and material connected with the laying of said tracks must be in strict conformity with the ordinances of the city council concerning the same, and to the satisfaction of said commissioner."

The first track was shifted as indicated in said tracing, and the second track laid in 1886, under the supervision and direction of an inspector appointed by the board of public works of the city, and the north rail thereof placed about four feet south of said quarter section line.

Ever since this work was done, the double tracks laid as above have been used by appellee for railroad purposes, to the great damage, as the evidence tends to show, of appellant's property.

Appellant acquired title to said sixteen lots in March, 1874, and in 1879 to 1881, erected thereon nineteen two-story brick buildings for renting purposes. At the time appellant acquired title to said lots and when he built his houses thereon, said first track was used for railroad purposes, but no claim is made in this case for damages because of the original construction of said first track and its use up to 1886. In 1886 the assessor for the West Division of the city of Chicago made a subdivision of unsubdivided lands in the south $\frac{1}{4}$ of the southwest $\frac{1}{4}$ of said section 31, in which said twenty-three acres is shown as lot 1, the north line of which extends to said quarter section line above mentioned. From 1866 to 1886 the Isham heirs paid taxes on said twenty-three acres and leased the same under the description of said lot 1, and claim that they never knew that the strip in question was at any time used as a street, and that they never consented to such use.

The principal point of contention of fact is as to the actual width of Bloomingdale road as used by the public from 1857 to 1886, which is conceded to have been a street or highway for travel from the south frontage of the lots in question, in the year 1872, to the quarter section line, or a width of about thirty-three feet, and so remained from 1872 to 1886, except as it may have been obstructed by the construction and use of said first track. In connection with this question of fact arise also questions of law as to whether, under the evidence, there was a dedication south of the quarter section line, and if not a dedication, whether there was a highway established by prescription or under the statute by twenty years user by the public. And further, that if it should be held that said road was not in fact a public highway south of the quarter section line, still appellant claims that appellee can not now be heard to say that it was not a public street, because of its action above

set forth, in applying for said permit, acting by virtue thereof, and constructing its tracks under the supervision of the city.

As to the first point of contention, in the opinion of the learned trial judge, which is made a part of appellee's brief, appears the following as to the question of user for twenty years, viz. :

"I have examined the testimony of all the witnesses upon that point, and I am inclined to think that the contention of plaintiff that there is a preponderance of testimony on the question of moving the fence is good. At the same time, the preponderance upon the proposition of the width of the street, and also upon the use of the roadway on either side, between 1857 and 1872, the time of the laying of the first track, is against the plaintiff, and the question arose, and I admit that I was in some doubt about it for a time, as to what the court ought to do, finding the preponderance for the plaintiff on the question of moving the fence, and finding a clear preponderance against him on the proposition of the width and use of the roadway."

This language clearly indicates, when considered in connection with the evidence, that the trial court was of opinion that the contention of appellant that the fence was not moved after it was moved by Steinhaus in 1857, is established by a preponderance of the evidence. This being the opinion of the trial court, then the point to determine was, where was the line of this fence. It is conceded that this fence was originally on the quarter section line, and it is clearly shown that the first track was laid north of it, but at no point more than four feet north of the quarter section line; that south of this track there was a ditch; that wagons were driven, from time to time, between the ditch and the first track; that there was a pathway between the ditch and fence, and the location of the fence in 1890, is fixed by actual survey. When it is considered that the established rule is that courses and distances must yield to monuments, when proved, it seems clear that the opinion of the trial court as to the fence not having been moved, fixes it where the sur-

veyor located it, at about thirty feet south of the quarter section line, and this view is strongly corroborated by the clear weight of the evidence, and should overcome the testimony of appellee's witnesses, whose testimony as to their memory of the width of the road seems to have been of controlling influence with the trial court. It is not necessary, however, to, and we do not, place this decision on the question of difference of opinion between this court and the learned trial judge on a controverted question of fact which he must have found against appellant, because he failed to give the proper weight to so significant a point of the evidence as the location of the fence, which he says was in appellant's favor. The questions of law arising in connection with this controverted fact are not important in the view of the case taken by this court, and will not be discussed, since they can not arise on another trial, if we are correct as to the other question of law.

Let it be assumed the land on which appellee's second track was laid, was in fact private property, as appellee contends; can it, under the facts in this record, now be allowed to say it was not a street? Appellee, at the time this suit was brought, August 2, 1888, claimed the right to occupy by its tracks the strip in question south of the quarter section line under an ordinance of and by a permit, pursuant to its application therefor, from the city of Chicago. It had no other right to occupy this strip. When appellee made its application to the city for a permit, it asked for a permit to construct and operate a double track "from the western limits of the city on Bloomingdale road to and across Coventry street," and with the application presented a tracing or map on which said road is shown, though the southern limits of the road are not shown. The permit was granted as requested, but upon condition that the first track should be "thrown over the necessary distance and proposed track laid alongside of present track so that the double track, when completed, shall occupy as nearly as practicable, the center of said Bloomingdale road." This permit was complied with strictly by appellee,

and under the supervision and direction of the city, and the tracks as constructed were used by appellee for railroad purposes up to the commencement of this suit. Appellee now says this strip was not a part of the street, but private property, and therefore there is no liability on its part for damages to appellant.

In the case of *Chicago, S. F. & C. Railway Co. v. Ashling*, 160 Ill. 379, which was an action of debt by appellee, as administratrix of Edward Ashling, deceased, against the Santa Fe Ry. Co., based on a judgment previously recovered for negligence of the Chicago & St. Louis Ry. Co., causing the death of said deceased, on the ground that the former company had, pending the original suit, become consolidated with the latter under the statute of this State, and the latter company was therefore liable for the judgment. The Santa Fe company denied the consolidation. The Supreme Court said: "This is not a direct proceeding to test the right of the Santa Fe company to hold the franchises and property of the St. Louis company, and to assert its corporate rights and franchises, and if the effect of what has transpired between the two companies amounts to a consolidation of the St. Louis company with the Santa Fe company, the latter can not, in this proceeding, be heard to say that it did not comply with the requirements of the statute, but it is estopped therefrom."

Hughes v. Carne, 135 Ill. 527, was a suit for partition by Hughes, the grantee of one Becker, in which, besides the partition, it was sought to set aside a tax deed to Carne, of a portion of the premises in controversy, as being invalid. It appeared that in the affidavit of Carne, and the affidavits accompanying it, and made a part thereof, which he presented to the county clerk when he applied for the tax deed, he mentioned said Becker as owner. He was required by law to serve a notice on the owner, and notify such owner by publication before he would be entitled to a tax deed. He published a notice addressed to said Becker as owner. On the trial Carne contended that Hughes had not been shown to be the owner, though it was shown she was

the grantee of Becker. The court said: "Carne is estopped from denying that Becker was the owner at that time" (referring to the time he made his affidavit and published the notice). "The applicant for a tax deed can not swear to the ownership of a party in order to get his deed, and then deny his own sworn statement when the deed is attacked."

Doane v. Lake Street El. R. R. Co., 165 Ill. 524, was a suit in which an abutting property owner asked an injunction against the railroad company to prevent it from building its road in the street in front of his property, on the claim that the ordinance under which the road was being constructed was illegal and void, because of non-compliance with certain requisites of the statute preliminary to an application to the city council by the railroad company, and to the passage of the ordinance. The relief asked was denied, for, among other reasons, that the owner had an adequate remedy by suit for damages. It was contended that if the railroad was unlawfully in the street it was a public nuisance, subject to be abated and removed at any time, and therefore that the owner could only recover damages to time of bringing his suit, and hence there would be a multiplicity of suits in order to make the remedy complete.

The court said: "We think it clear the defendant, if sued for resulting injury, could not be heard to say its road was a nuisance, or built in violation of law. Having accepted and availed itself of the grant of authority from the city to occupy the street, it would be estopped to question the validity of that authority. For the purposes of recovery against it of damages, whether present or prospective, its road must be deemed lawfully in the street, and it compelled to fully compensate all parties injured on that theory. This proposition seems to us so reasonable that authorities need scarcely be cited in its support."

The principle announced in the foregoing cases is not that of an estoppel *in pais* or equitable estoppel, as is contended by appellee. It is unnecessary, in the application of this principle, that the party seeking its application should show that he had taken action relying on the representations or

acts of the opposite party, but the courts say it is enough to debar a party from being heard, if he alleges his past action was wrongful, or that his representation was untrue, when it is sought to enforce a liability based on that past action or representation.

In the Doane case, it does not appear that the property owner was caused to take any different position or do anything to his injury because of the acts of the railroad company. In the Carne case, neither Hughes nor her grantor, Becker, was placed in any different position because Carne had sworn Becker was the owner of the land in controversy, and gave notice to him as such owner.

So in the Ashling case, neither the administratrix nor her decedent, for whom she sued, had anything whatever to do with the action of the railway companies with reference to consolidation, directly or indirectly, nor was either of them caused to do or omit to do anything by reason thereof.

The following cases support the principle announced in the cases, *supra*: City of Chicago v. Wheeler, 25 Ill. 478; Higgins v. City of Chicago, 18 Ill. 276; People v. Maxon, 139 Ill. 306; Union Mutual Life Insurance Co. v. Slee, 123 Ill. 57; Thatcher v. People, 98 Ill. 632; Pool v. Breese, 114 Ill. 594; Purcell v. Town of Bear Creek, 138 Ill. 524.

We think the contention of appellee's counsel that the map presented to the city and made by the engineer of the railroad company shows Bloomingdale road a thirty-three foot street, is not tenable. On the contrary, this plat fails to fix any southern boundary to this road. The application accompanying the map asked for a double track on the road as shown on the tracing, and it shows two tracks on the road, one north and the other south of the quarter section line, about equi-distant therefrom. The permit was to construct an additional track on Bloomingdale road, on condition that when completed, the two tracks should "occupy as nearly as practicable the centre of said Bloomingdale road."

This clearly amounted to a statement by the company that Bloomingdale road at this point was a public street

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north as well as south of the quarter section line, and the city so considered it, or it would not have granted the permit with the conditions imposed by it. The company, by acting under the permit in building its tracks, as it did in the space north of the south fence and south of the quarter section line, under the supervision of the city, and without any other right to occupy this space, said, in effect, it laid its tracks on a public street, the middle of which was the quarter section line. It follows from the above that the trial court erred in not holding appellant's first proposition of law, which was based on these facts and the principle of law above stated.

It seems unnecessary to discuss appellant's claim to recover under his third count, whether the strip in question be held a street or not, but would say we are of opinion the contention is not tenable. Appellant, having alleged in said count that his lots abutted Bloomingdale road, that this road afforded access to and egress from his houses, and that appellee took possession of said road, whereby appellant was injured, made the existence of said road material, it being descriptive of locality, and he should have proved it, in order to entitle him to a recovery. *Wisconsin C. R. Co. v. Wiczorek*, 151 Ill. 585; 1 Chitty's Pl. 252; *Jerome v. Whitney*, 7 Johns. 321; *Buddington v. Shearer*, 20 Pick. 477.

The judgment will be reversed and the cause remanded.

Judge SEARS took no part in the decision of this case.

Herman Knuth v. Geo. A. Weiss Malting and Elevator Company.

1. **NEGLIGENCE**—*When a Question of Fact and When of Law.*—When the evidence on material facts is conflicting, or when, on disputed facts, fair-minded men of ordinary intelligence may differ as to the inferences to be drawn, or where, on even a conceded state of facts, a different

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conclusion would reasonably be reached by different minds, in all such cases negligence is a question of fact. Whenever there is a reasonable chance of conclusions differing as to the existence or non-existence of negligence, the question is for the jury, and it only becomes a question of law when, from the facts admitted or conclusively proved, there is no reasonable chance of reasonable minds reaching different conclusions.

2. *SAME—Held to be a Question for the Jury Under the Evidence in this Case.*—From a careful consideration of all the evidence in this case, the court concludes that it can not be held, as matter of law, that the plaintiff was guilty of negligence which contributed to the injury sued on, or that the defendant was not guilty of negligence which caused said injury, and therefore that these questions should have been submitted to the jury.

Trespass on the Case, for personal injuries. Error to the Circuit Court of Cook County; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the October term, 1897. Reversed and remanded. Opinion filed December 16, 1897.

JAMES C. McSHANE, attorney for plaintiff in error.

JOHN A. POST, attorney for defendant in error; SAMUEL S. PAGE, of counsel.

MR. PRESIDING JUSTICE ADAMS DELIVERED THE OPINION OF THE COURT.

The plaintiff in error was employed by defendant as foreman in a kiln room, which is described as follows: The room is seventy-seven feet long, about thirty-nine feet wide, and the ceiling about twenty-four feet high. The east wall is solid. There is a row of windows in the west wall, facing on the street, which are about ten feet above the floor. There are also windows of the same height in the north and south wall facing on an alley. There are two doors at the northeast corner, one leading through the north wall into an alley, the other through the east wall into an adjoining room. The southeast corner is exactly the same in this regard. The doors are about four feet above the floor, and there are steps leading up to them. In the center of the room, about equi-distant from the north and south and east and west walls, are two brick furnaces extending from floor

to ceiling, the north furnace being $12\frac{1}{2}$ feet from the north wall, and the south one the same distance from the south wall. The distance north and south between the furnaces is $26\frac{1}{2}$ feet. The shafting extending along the east wall is about three feet six inches from the floor and extends out about two feet from the wall. The cog wheels on the shafting, which present a face view when viewing the elevation, are connected with, and are for the purpose of turning the shafting, which extends through the east wall. The largest cog wheels are about two feet in diameter. There are four incandescent lights in the room, situated $2\frac{1}{2}$ feet from each end of each furnace. They are suspended from the ceiling by a cord, are about six feet from the floor, and are about the size of the incandescent lights used in offices and the court rooms. Of the nearest lights to the point of the accident, one was twenty-three feet and the other eighteen feet distant. The lights north and south of the furnaces can not be seen from the point of the accident.

It was the plaintiff's duty to attend to the fires in the furnaces, and to keep the shafting clean, and oil it every night. There was no guard, railing, or partition of any kind in front of the shafting. Plaintiff had been in defendant's employ about a year and a half before the accident herein-after mentioned, the last two months of which time he was employed in the kiln room, the last month at night and the month before the last in the day time. April 27, 1894, about 9:30 o'clock P. M., the plaintiff's jacket or jumper was caught in one of the cog wheels and in attempting to extricate himself his left arm was crushed off immediately below the elbow, necessitating amputation.

At the close of the plaintiff's evidence, the court, on motion of defendant's attorney, instructed the jury to find the defendant not guilty. A motion for a new trial was overruled and judgment rendered on the verdict.

The taking of the case from the jury is assigned as error. The court must have taken the case from the jury either because, in the opinion of the court, the evidence showed contributory negligence on the part of the plaintiff which

would preclude a recovery, or because the evidence did not sustain the allegations in the plaintiff's declaration of negligence of the defendant, or for both these reasons.

In *Wabash Ry. Co. v. Brown*, 152 Ill. 488, the court say : "Negligence is ordinarily a question of fact. When the evidence on material facts is conflicting, or when, on disputed facts, fair-minded men of ordinary intelligence may differ as to the inferences to be drawn, or where, on even a conceded state of facts, a different conclusion would reasonably be reached by different minds, in all such cases negligence is a question of fact. The fact to be determined is the existence or non-existence of negligence. With all the facts considered, if there is a reasonable chance of conclusions differing thereon, then it is a question for the jury. Negligence may become a question of law when, from the facts admitted or conclusively proved, there is no reasonable chance of reasonable minds reaching different conclusions."

What is here said is in conformity with prior decisions of the Supreme Court (*Lake S. & M. S. Ry. Co. v. Johnsen*, 135 Ill. 641, 647), and is the doctrine announced by text writers. *Beach on Cont. Neg.*, Secs. 162, 163; *Cooley on Torts*, Secs. 670, 671.

Such being the law, the questions are, whether the evidence was such that fair-minded men of ordinary intelligence might reasonably differ as to whether the plaintiff was guilty of negligence which contributed to the injury, and whether such men might reasonably differ as to whether the defendant was guilty of negligence which caused the injury. These questions involve an examination of the evidence. A motion to instruct the jury to find for the defendant, is in the nature of a demurrer to the evidence, and admits not only all the evidence proves, but all it tends to prove. *Ward v. City of Chicago*, 15 Ill. App. 98; *Pennsylvania Co. v. Conlan*, 101 Ill. 93, 105-6; *Frazer v. Howe et al.*, 106 Ill. 563, 573.

The evidence discloses the following circumstances: There was no railing or guard of any sort in front of the shafting and cog wheels, or between the shafting and cog wheels and the furnaces, where the plaintiff was required to work

tending the fires. The kiln room was built about a year before the accident, and the evidence shows that after it was built it was the intention of the company to place a guard in front of the shafting. Charles Veyhl, a millwright in the employ of the defendant, was called as a witness by the plaintiff, and testified that about March, 1893, he heard Mr. Weiss, the president of the defendant company, speak about a rail about the shaft along the east wall; that he, the president, told Hassman, the foreman, to take the measure for a wooden fence across there; and that Hassman measured for the fence, and told Mr. Weiss that a wooden fence would not look very well, that an iron one would look better. This witness further testified that the direction of Weiss, the president, was to measure for a fence around the shafting, extending from south to north about two feet west of the shafting; and that afterward he heard Hassman, the foreman, remark that he was to write to the iron makers to put up a fence there, but the witness says none was ever put up.

Henry Olson, a witness called by plaintiff, testified that he was a member of the firm of Olson & Tilman, in the machinery and millwright business; that he was employed by the defendant and acted as superintendent in putting up the shafting, and had a conversation with Weiss and Hassman about putting up a railing along the shafting; that Mr. Weiss, pointing to the room, said "there should be a railing around here;" and that at another time he heard Hassman say they were going to have a railing there, and that as he, witness, understood it, the contract was let. The plaintiff testified that about a month after he commenced working in the kiln room, he spoke to Hassman about guards or railing for the shafting; that he said "Mr. Hassman, that is a kind of dangerous place; I think there ought to be a guard along this rail," and Hassman said, "That is all right, Herman, I will 'tend to that." Also, that four or five days before the accident, he said to Hassman, "This is too dangerous for me altogether; I am going to quit this job, if there is not a railing put up here;" when Hassman said, "That is all

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right, Herman, you can stay to work, and I will see that it is put up there right away." When Hassman said this to me, I said, "All right."

The plaintiff was the only witness as to the circumstances attending the accident and how it happened. He says that he had been cleaning and poking the fires for about ninety minutes, and had just finished that work, and was standing at the east door on the north side of the south furnace, when he heard a squeaking noise at the upright shaft, and walked toward the shaft trying to locate the place from which the noise came; that his eyes were somewhat dim from looking into the fires so long, and the lights were poor, and that, before reaching the place where the accident occurred, and about half way to that place, he stopped and rubbed his eyes with his hand, and they gradually grew better; that the lights were behind him, and as he walked over to the place of the accident, he could just discover the cogs. He then went on toward the upright shaft and stood about a foot and a half from the cog wheels and strained his ears to discover, if possible, where the squeaking noise came from. He had on a striped jacket, such as is known among working men as a "jumper." The north and south doors were open, and he says a draught of wind blew his jacket into the connecting cog wheels, and his left arm was caught. He says that one had to get pretty close to tell the exact place where the sound came from, also, that it was his duty to keep the shaft oiled and cleaned when needed. He says that when he halted, about half way from where he started to the place of the accident, Ferdinand Conkle, the engineer, came in and said there was something squeaking; that Conkle was about twenty-five or thirty feet away from him, and he recognized him by his voice, but could not tell by sight whether it was he. There were only two of the electric lights in the room which could have shed light on the cog wheels where the accident occurred, one of them about twenty-three and the other about eighteen feet distant from the cog wheels, and the witness testified that the room was very poorly lighted, and that he had complained to the night

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foreman several times about the poor light—had said to him, "The place is very poorly lighted, a person can't hardly see."

Omitting comment on the plaintiff's evidence for the reason that the case must go to another jury if not otherwise disposed of, our conclusion, from a careful examination of all the evidence, is that it can not be held, as matter of law, that the plaintiff was guilty of negligence which contributed to the injury, or that the defendant was not guilty of negligence which caused the injury, and therefore that these questions should have been submitted to the jury.

We have made no reference to the declaration, because it is not claimed that it was not sufficient to admit the plaintiff's evidence.

The judgment will be reversed and the cause remanded.

Judge WINDES took no part in this decision.

Nicholas Martin et al. v. Patrick J. Sexton.

A. H. Blackall et al. v. Same.

72	395
82	434
72	395
183	472
72	395
94	421

1. CHATTEL MORTGAGES—*Statute as to, Must be Followed.*—An agreement conveying personal property and having the effect of a mortgage is invalid as to subsequent purchasers and incumbrancers if the possession of the property remains with the grantors and the agreement is not acknowledged and recorded as required by statute.

2. SAME—*Change of Possession on Default.*—In a suit involving the right to certain personal property covered by two chattel mortgages the court reviews the evidence and holds that the possession of the book-keeper of the mortgagor acting as agent for one mortgagee was not sufficient under the circumstances as against the other mortgagee, and that a seizure of the property by the latter gave him a prior lien.

3. PLEADING—*Pleadings Construed Most Strongly Against the Pleader.*—That any pleading must be construed most strongly against the pleader is elementary; and under this rule, where the validity of a chattel mortgage is attacked, the mortgage should be set out or facts shown from which the court can see that it is invalid.

4. APPEALS AND ERRORS—*Pleadings Filed After Order Appealed*

From is Made.—On an appeal from an original order appointing a receiver, the court can not consider amended or supplemental bills filed after the appointment.

Bill, to foreclose a chattel mortgage and for other relief. Appeal from the Superior Court of Cook County; the Hon. JONAS HUTCHINSON, Judge, presiding. Heard in this court at the October term, 1897. Reversed and remanded. Opinion filed October 21, 1897.

FLOWER, SMITH & MUSGRAVE, attorneys for appellants Nicholas Martin and James B. Gascoigne.

NEWMAN, NORTHRUP & LEVINSON, attorneys for appellants A. H. Blackall & Son, A. H. Blackall, E. S. Blackall and L. M. Blackall.

M. KAVANAGH and ALEX. S. BRADLEY, attorneys for appellee.

MR. JUSTICE WINDES DELIVERED THE OPINION OF THE COURT.

These cases are appeals from an order appointing a receiver, and were consolidated and heard on one record, the same abstracts and briefs.

Appellee filed a bill against all of the appellants, in which he alleged that he made an agreement September 22, 1896, with appellants Blackall & Son, a corporation, A. H. Blackall, E. S. Blackall and L. M. Blackall. According to the allegations of the bill, this agreement is a conveyance of personal property having the effect of a mortgage; provides for the possession of the property to remain with the grantors, and has been neither acknowledged nor recorded, as required by Rev. Stats. of Ill., Ch. 95, Secs. 1-4.

July 15, 1897, appellant E. S. Blackall, acting for said corporation, and the other Blackalls, agreed with said Sexton that one Rose Gifford, who was then employed as book-keeper in said business, should have and keep the custody and possession of said property, take all cash received in said business and turn it over to said Sexton, who should pay necessary bills and carry out said agreement. She was, it is alleged, placed in charge and possession accordingly,

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but what possession and charge she had is not shown by any facts alleged, except that she had the key to the store where the business was conducted. There is no showing but that there were other keys to the store, nor that the business was not conducted the same as previously.

July 20, 1897, appellant Martin, with other persons, entered said store and demanded possession of all the said property, and appellant A. H. Blackall then gave possession of said store and property to said Martin. Said Martin and Blackall then required and compelled said Gifford to leave and give up possession of said store and property, and took forcible possession of the same, and the same were, at the filing of said bill, in the possession of said Martin, and he was carrying on said business. Said Sexton was wholly excluded from any possession or control of said store, property, business and cash receipts.

The bill alleges that said Sexton does not know the full nature of said Martin's claim, but that he claims to have taken possession by virtue of some mortgage, and that said Sexton is informed and believes that said Martin is acting in collusion with said Blackalls and under color of a pretended mortgage executed by said corporation to said appellant Gascoigne as trustee on or about April 30, 1897, with intent to hinder, delay and defraud said Sexton, which mortgage purports to convey to said Gascoigne the same property conveyed to said Sexton, and that it was recorded in the records of Cook county in book 5492, p. 338, and it, or a copy thereof, would be produced at the hearing.

It is further alleged that if said Martin or Gascoigne has acquired any interest, legal or equitable, in said property as against said corporation, yet that such interest has accrued since said conveyance to said Sexton, and is subject to the rights of said Sexton by virtue of said conveyance and agreement. No fact is alleged as to why it is a pretended mortgage, nor why the interest, if any, of Martin or Gascoigne is subject to the rights of Sexton.

That the allegations of any pleading must be taken most strongly against the pleader is elementary. For aught that

appears by any allegations of fact in the bill, the mortgage to Gascoigne was properly executed, acknowledged and recorded, and is a valid and subsisting lien, superior to that of Sexton; but if that is not true, at least enough appears to show that it is a mortgage executed by the corporation and good between it and Gascoigne, and since Sexton has failed to set it out or show any fact from which this court can see that it is invalid, it must be taken to be of equal validity to the agreement with Sexton. The agreement with Sexton is invalid as to subsequent purchasers or incumbrancers because it was not acknowledged and recorded. Rev. Stat. Ill., Ch. 95, Sec. 1; Blatchford v. Boyden, 122 Ill. 668; Frank v. Miner, 50 Ill. 447.

The possession of Rose Gifford, she being the bookkeeper of the Blackalls, under the circumstances above stated, was not sufficient as against Martin and Gascoigne. Richards v. Matson, 51 Ill. App. 530, and cases cited.

The possession of Martin is alleged to be complete, and that he was carrying on said business at the time of filing the bill. This makes his right superior to that of Sexton. See Frank v. Miner, 50 Ill. 447, in which the Supreme Court says, with regard to two mortgages, each of which had been acknowledged in a precinct different from that in which the mortgagor resided: "It then follows that neither mortgage acquired any advantage over the other by priority in date, or other act in procuring their mortgages. They were void as to each other as well as to all others; but being governed by the common law, the mortgages would become valid and binding as to subsequent creditors and purchasers so soon as the property was reduced to possession by either mortgagee, under and in pursuance to the terms of his mortgage, and Garretson was the first in the race to get the possession." Garretson was in this case the junior mortgagee.

The appeal being from the original order appointing the receiver, we can not consider the amended and supplemental bill filed after he was appointed, but when it is considered in connection with the affidavits in the record, a

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receiver should not have been appointed, because its additional allegations are met by statements in the affidavits.

It is unnecessary, from the views expressed, to consider the other questions discussed by counsel.

The order appointing the receiver will be reversed and the cause remanded.

International Building, Loan and Investment Union
et al. v. Margaret McGonigle et al.

72	398
72	170
72	399
85	405
73	899
100	805

1. **APPEALS AND ERRORS—Orders Making Changes in Receivers Not Reviewable.**—An order substituting one person for another as receiver, affects only the *personnel* of an officer of the court, is purely a matter of judicial discretion and as an interlocutory order is not reviewable on appeal in the absence of legislation authorizing it.

2. **SAME—Act of 1887 as to Appeals from Certain Interlocutory Orders Construed.**—The act of 1887, authorizing appeals from orders appointing receivers or extending their powers does not cover the acts of the court in making changes from time to time in the person acting as receiver.

BILL, for an accounting and a receiver. Appeal from the Circuit Court of Cook County; the Hon. OLIVER H. HORTON, Judge, presiding. Heard in that court at the October term, 1897. Appeal dismissed. Opinion filed October 21, 1897.

CARLTON S. WINSLOW, attorney for appellants.

No appearance for appellee.

MR. JUSTICE SEARS DELIVERED THE OPINION OF THE COURT.

This appeal is from an interlocutory order appointing William H. Hall receiver of the International Building, Loan and Investment Union, in lieu of Stensland, Schilling, Emrick, Bradwell and Furlong, receivers theretofore appointed and then resigned.

On October 3, 1896, a bill was filed in the Superior Court of Cook County, by William Clark et al., against the appellant corporation.

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On January 5, 1897, an intervening petition in the nature of a bill in chancery was filed in said cause by the attorney-general, in the name of the people, and on the relation of David Gore, auditor, etc. On the same day the Superior Court entered an order in said cause, appointing Stensland, Schilling and Emrick receivers of the appellant corporation, and they immediately qualified.

On October 5, 1896, a bill was filed in the Circuit Court of Cook County, by Margaret McGonigle, against the appellant corporation.

On December 31, 1896, an intervening petition was filed in the last named cause by Strubing et al., and on the same day an order was entered in accordance with the prayer of such petition appointing Bradwell and Furlong receivers of the corporation.

On May 25, 1897, the Clark cause was transferred from the Superior Court to the Circuit Court and there consolidated with the McGonigle cause still pending in that court.

On the 9th day of June, 1897, an order was entered by the Circuit Court in the consolidated causes, denying a motion to discharge the receivers theretofore appointed.

On the 16th day of June, 1897, a further order was entered, in which it is recited that "the interests of the stockholders and creditors will be greatly injured unless the court shall continue the receivership in said cause," etc.

And on the same day the order was entered from which this appeal is prayed.

The order in effect accepts the resignation of Stensland, Schilling, Emrick, Bradwell and Furlong, as receivers, and substitutes Hall as receiver in their place and stead in the words following: "This cause coming on this day to be heard, and Paul O. Stensland, George A. Schilling, George M. Emrick, Thomas Bradwell and James Furlong, who were heretofore appointed as receivers of the business and assets of all the said International Building, Loan and Investment Union, a corporation, having each tendered to the court their resignation as such receivers, * * * it is therefore ordered, adjudged and decreed by the court that the resigna-

tion of said Stensland, Schilling, Emrick, Bradwell and Furlong, as receivers, and all and each of them, be and the same is hereby accepted, * * * that William A. Hall be and is hereby appointed sole receiver of the business and assets of the said International Building, Loan and Investment Union in the place and stead of the said Stensland, Schilling, Emrick, Bradwell and Furlong, receivers as aforesaid," etc.

It seems that from such an order no appeal will lie. In the absence of legislation the act of the chancellor appointing a temporary receiver is held to be largely a matter of judicial discretion. High on Rec. 25.

And in our State, prior to the act of June 14, 1887, appointment of a receiver *pendente lite*, being an interlocutory order, was held to be not reviewable upon writ of error. *Coates v. Cunningham*, 80 Ill. 467.

Looking at the reason of the rule, there is much more ground for holding that in the absence of legislation no appeal could lie from an interlocutory order merely substituting one person for another as receiver. Such order, affecting only the *personnel* of an officer of the court, is purely a matter of judicial discretion, and, as an interlocutory order, is not reviewable upon appeal under the rule of *Coates v. Cunningham*, *supra*.

We have only to inquire, then, whether this order comes within the provisions of the act of 1887. The provisions of that act in part are, "That whenever an interlocutory order or decree is entered in any suit * * * appointing a receiver, or giving other or further powers or property to a receiver already appointed, an appeal may be taken from such interlocutory order or decree," etc.

We can not interpret this statute to cover the successive acts of a court in changing from time to time the person of a receivership. If by such an order the scope of the receivership is changed by enlargement, then the statute in express terms extends to such order.

But by this order no change is made in the "powers" or "property" of the receivership. It was merely the act of the court exercising its discretion as to the person who should

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continue *pendente lite* in the same receivership theretofore created. Neither by the common law nor by force of the statute is such discretion reviewable.

The appeal is dismissed.

McCormick Harvesting Machine Co. v. August Sendzikowski.

1. **VARIANCE**—*A Variance Held Fatal*.—That the allegations and proofs must correspond, is elementary, and in a suit by a servant against his master for injuries caused by a defective tool, proof that the servant asked for and the master agreed to furnish a new tool, does not sustain an allegation that the defect was unknown to the servant.

2. **SAME**—*Time at Which the Question Should be Raised*.—It is immaterial when the question of variance is called to the attention of the trial court, if it is done at the trial at a time when the plaintiff may avoid the variance by amendment of his pleadings.

3. **EVIDENCE**—*Certain Evidence Held Not to be Hearsay Evidence*.—The objection made in this case, that it was error for the court to allow the appellee to testify as to conversations between himself and another employe of appellant, as to what appellant's foreman told such employe when appellee was not present, can not be sustained because it appears that such employe and appellee were acting under the orders of the foreman, in doing work the foreman ordered them to do, and that such employe was directed by the foreman to convey his order to do the work to appellee.

4. **INSTRUCTIONS**—*Undue Prominence of Particular Words*.—The court holds that certain instructions asked for in this case were properly refused because undue prominence was given to certain words by using large type in printing them, the remainder of the instructions being in type about half as large.

5. **MASTER AND SERVANT**—*Promises by Master to Repair Defective Machinery*.—When a master, on being notified of defects in machinery by a servant, promises to make the needed repairs, the servant may remain in the employment a reasonable time, to permit the performance of the promise, without being guilty of negligence. And the promise need not be to repair immediately; a promise to repair within a reasonable time is sufficient.

6. **PRACTICE**—*Special Interrogatories Must Relate to Ultimate Facts*.—Special interrogatories, to be submitted to the jury, must relate to ultimate facts decisive of the case.

Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. JAMES GOGGIN, Judge, presiding.

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McCormick Harvesting Machine Co. v. Sendzikowski.

Heard in this court at the October term, 1897. Reversed and remanded.
Opinion filed December 23, 1897.

UNDERWOOD & BUTLER, attorneys for appellant.

"It is a rule of pleading subject to no exception, that a party must recover, if at all, on and according to the case he has made for himself in his declaration. He is not permitted to make one case by his allegations and recover on a different case made by the proof." *Moss et al. v. Johnson*, 22 Ill. 633; *Wolsey v. Ellenville*, 23 N. Y. Supp. 410; *Long v. Doxey*, 50 Ind. 385; *Waldhier v. Hannibal, etc.*, R. Co., 71 Mo. 514; *Buffington v. Atlantic, etc.*, R. Co., 64 Mo. 246; *Chicago, B. & Q. R. R. Co. v. Magee*, 60 Ill. 529; *Toledo, W. & W. Ry. Co. v. Foss*, 88 Ill. 551; *Toledo, W. & W. Ry. Co. v. Beggs*, 85 Ill. 80; *Ebsery v. Chicago City Ry. Co.*, 164 Ill. 524.

"The law is well settled that in a case of this kind the allegations of the declaration, and the proofs, must agree, and the plaintiff can not charge in his declaration a specific act of negligence and succeed on the trial by proving another act of negligence wholly different from that charged." *Chicago, B. & Q. R. R. Co. v. Dickson*, 143 Ill. 368.

The same doctrine has been repeatedly declared in innumerable decisions in this State. It is applicable in equity as well as in law. *Tuck v. Downing*, 76 Ill. 71; *Chicago & A. R. R. Co. v. Michie*, 83 Ill. 427; *Dowden v. Wilson*, 108 Ill. 257; *Kidder v. Vandersloot*, 114 Ill. 133; *Boone v. Clark*, 129 Ill. 466; *Dougherty v. Catlett*, 129 Ill. 431; *Purdy v. Hall*, 134 Ill. 298; *Coale v. Moline Plow Co.*, 134 Ill. 350; *Reed v. Reed*, 135 Ill. 482; *Terre H. & I. R. R. Co. v. Peoria & P. U. Ry. Co.*, 167 Ill. 296.

"If a plaintiff could allege in his declaration one ground of recovery and on the trial prove another, a defendant could never be prepared for trial. One great object of a declaration is to notify the defendant of the nature and character of the plaintiff's demand so that he may be able to prepare for a defense; but if one ground of action may be alleged and another proven, a declaration would be a

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delusion, instead of affording defendant notice of what he was called upon to meet. *Wabash W. Ry. Co. v. Friedman*, 146 Ill. 583.

The object of compelling a party, objecting on the ground of variance, to raise the question in the trial court, is to afford the opposite party the opportunity of amending his pleadings. So long as the opportunity to amend the pleadings is afforded, it is not too late to raise the question of variance in the trial court. We understand the purport of all the decisions in this State to be, that if the question of variance is properly raised on the trial, either by objecting to the evidence when offered, or by a motion made to the court after the evidence has all been produced, to exclude the same from the jury, or by a motion to instruct the jury to find for the defendant, the same is sufficient. The party seeking to raise the question of variance may select any of these various modes that he may see fit to adopt during the progress of the trial of the case. *Lake S. & M. S. Ry. Co. v. Ward*, 135 Ill. 511; *Wabash W. Ry. Co. v. Friedman*, 146 Ill. 583; *Libby, McNeill & Libby v. Scherman*, 146 Ill. 540; *Harris v. Shebek*, 151 Ill. 287.

The duty rests on the servant to observe whether the machinery furnished him is in repair, and if tools are furnished him in good condition and become defective and out of repair afterward, he must report to the master that fact. He must cease working with defective machinery as soon as he discovers its defectiveness. *Monmouth, M. & M. Co. v. Erling*, 148 Ill. 521; *Toledo, W. & W. R. R. Co. v. Eddy*, 72 Ill. 138; *Richardson v. Cooper*, 88 Ill. 270; *Chicago & N. W. Ry. Co. v. Jackson*, 55 Ill. 492; *Illinois Cent. R. R. Co. v. Jewell*, 46 Ill. 99.

It is now uniformly stated by text writers that where a master, on being notified by the servant of defects that render the service he is engaged to perform more hazardous, expressly promises to make immediate repairs, the servant may continue in the employment a reasonable time to permit the performance of a promise in that regard, without being guilty of negligence. *Missouri Furnace Co. v. Abend*, 107 Ill. 44; *Swift & Co. v. Madden*, 165 Ill. 41.

The law is that when the servant becomes aware of the extra hazard in his employment, it is his duty to quit working at once, or notify the master and call upon him to remedy the defect. He is only justified in remaining in his employment and working with a defective tool after he has brought notice of the defect home to the master, upon the express promise of the latter that he will remedy the defect within a reasonable time. *Waldron v. Alexander*, 136 Ill. 550; *Chicago, Milwaukee & St. P. Ry. Co. v. O'Sullivan*, 143 Ill. 48; *Chicago, B. & Q. R. R. Co. v. Dickson*, 143 Ill. 368; *Camp. Pt. Mfg. Co. v. Ballou*, 71 Ill. 417; *Chicago & A. R. R. Co. v. Munroe*, 85 Ill. 25.

HURLEY & KOERNER and W. E. ODEN, attorneys for appellee.

MR. JUSTICE WINDES DELIVERED THE OPINION OF THE COURT.

This is the second appeal of this case to this court. (58 Ill. App. 418.) On the first appeal by the plaintiff below, appellee on this appeal, the judgment was reversed, the court having instructed a finding for defendant. A second trial has resulted in a verdict for appellee of \$7,500 and judgment thereon, from which this appeal is taken. Appellant claims there was a fatal variance between plaintiff's declaration and the proof; that there was error in the giving and refusing of instructions; that the court admitted improper evidence for plaintiff; that there was not evidence to sustain the verdict; that the injury was caused by an assumed hazard, and that there was error in refusing the second special finding submitted for the jury.

The first count of the declaration alleges, in substance, that on May 7, 1890, the plaintiff was an employe of the defendant; that defendant was engaged in the business of manufacturing and selling agricultural implements and machinery in Cook county, Illinois, and that it was the duty of defendant to furnish plaintiff safe and suitable machinery, tools, utensils and appliances in good order and condition for use in his employment; that defendant did

not regard its duty in that behalf, but did furnish, by its servant, its foreman, to an employe of defendant, for use, a chisel which contained a flaw or defect, which fact was well known to the said foreman, but unknown to plaintiff, and defendant made default therein, and did not regard its duty; and while plaintiff and one of the other employes of defendant, on said day, with due care and diligence, were using said chisel in the performance of their duties in the business of defendant, the chisel so carelessly, negligently and improperly furnished, by reason of said defect or flaw, and while in ordinary use, was then and there caused to and did break, and a piece of said chisel struck plaintiff with great force and violence in the left eye, totally destroying the sight thereof, and permanently injuring plaintiff, etc.

By an additional count it was alleged, in substance, in addition to the allegations of the first count above stated, that defendant did not regard its duty, but on the contrary furnished plaintiff, for use, a chisel which contained a flaw or defect, which fact was well known to defendant, but was unknown to plaintiff, and therein defendant made default, and did not regard its duty, and on said day, while plaintiff and one of defendant's employes, with due care and diligence were using said chisel in the performance of their duties in the business of defendant, the chisel so carelessly, negligently and improperly furnished by defendant, and by reason of said defect or flaw, and while in ordinary use, was then and there caused to and did break, and a piece struck the plaintiff with great force and violence in the left eye, totally destroying the sight, and permanently injuring the plaintiff, by reason whereof the right eye of plaintiff has also become greatly weakened and injured, and the sight thereof greatly impaired; and plaintiff is informed by his physician that he will probably become totally blind, and thereby plaintiff was otherwise hurt, etc.

Appellant filed the general issue to the above counts.

On the trial the jury answered yes to the first special finding, to wit: "Did the plaintiff after he knew of the alleged defect in the chisel with which he was working,

continue to work with it, under the promise of the defendant that the defendant would repair the defect, or furnish a good chisel in the place of the one with which he was working?"

The jury also answered no to the third special finding, to wit: "Was not the injury received by plaintiff the result of one of the ordinary and well known risks of employment in which he was engaged, and which he assumed while working in the employ of defendant, as a chipper of castings?"

The preponderance of the evidence justifies both said special findings.

Both counts of the declaration allege that the flaw or defect in the chisel which caused the injury was unknown to the plaintiff; in the first, that it was well known to appellant's foreman, and in the additional count that it was well known to defendant.

The evidence shows, and the jury found as above stated, that plaintiff knew of the defect in the chisel and continued to work with it after such knowledge. That the allegations and proof must correspond—must agree—is elementary. They do not agree in this case, and the variance is fatal if it was properly presented to the court in apt time. *Illinois C. R. R. Co. v. McKee*, 43 Ill. 119; *Toledo, W. & W. Ry. Co. v. Beggs*, 85 Ill. 80; *Chicago, B. & Q. R. R. Co. v. Bell*, 112 Ill. 360; *Chicago, B. & Q. R. R. Co. v. Dickson*, 143 Ill. 368; *Wabash W. Ry. Co. v. Friedman*, 146 Ill. 583; *Terre H. & I. R. R. Co. v. Peoria & P. U. Ry. Co.*, 167 Ill. 296.

In the Friedman case, *supra*, the court say, speaking of the question of variance: "It may be said that the question involved is a technical one, and hence not entitled to that consideration which a court should give to a question which goes to the merits of an action, and plaintiff had the right, when the question was raised, to amend his declaration, and thus obviate the difficulty, but he saw proper to take another course, and he occupies no position now to complain should the rules of law that control in such cases

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be strictly enforced against him. * * * If the plaintiff may allege in his declaration one ground of recovery, and on the trial prove another, a defendant never could be prepared for trial. One great object of a declaration is to notify the defendant of the nature and character of the plaintiff's demand, so that he may be able to prepare for a defense; but if one ground of action may be alleged and another proven, the declaration would be a delusion, and instead of affording a defendant notice of what he was called upon to meet, it would be a deception."

According to the declaration in the case at bar, the very gist of the plaintiff's right to recover was in the fact that he did not know of the defect in the chisel which caused his injury, and appellant had the right to prepare its defense with reference to that fact, and rely upon the allegations of the declaration in that regard. It seems that the case was tried on the theory of an order by the foreman to plaintiff to work with the defective chisel, and a promise to supply a chisel without defect. That was not the case alleged. No order or promise to plaintiff is set out in the declaration. At the close of all the evidence, appellant's attorneys moved the court to give the following instruction, viz.: "The court instructs the jury to find the defendant not guilty." And appellant's attorneys then and there stated to the court, in support of their motion to give said instruction, that they did so upon the following grounds: "First, that in the original declaration it was alleged that the defendant by its then servant or agent, to wit, its foreman, did furnish to one of the employes of said defendant, for use, a chisel which contained a flaw or defect, which fact was well known to said foreman, but was unknown to the plaintiff, and therein did make default, etc.; and secondly, in the additional count of said declaration, filed November 14, 1892, the plaintiff charged that the defendant did furnish to the plaintiff, for use, a chisel which contained a flaw or defect, which fact was well known to the defendant, but was unknown to the plaintiff, and therein did make default, etc.; whereas the evidence in the case shows conclusively and

without question that the plaintiff did know of the alleged flaw or defect in the chisel described in the declaration and in the additional count thereto, and that after examining said chisel sent his fellow-laborer to the foreman of the defendant to see if he could get another chisel in its place, and was told, so he says, to go on working for awhile with said alleged defective chisel; and that by reason thereof the facts alleged in said declaration and the facts shown by the evidence and proved upon the trial constitute a fatal variance."

But the court refused to give said instruction, and no motion was made by plaintiff to amend his declaration.

The question of variance was thus fully and specifically presented to the court and in apt time. *City of Mattoon v. Fallin*, 113 Ill. 249; *Lake S. & M. S. Ry. Co. v. Ward*, 135 Ill. 511; *Wabash W. Ry. Co. v. Friedman*, 146 Ill. 583; *Libby v. Scherman*, 146 Ill. 540; *Probst Construction Co. v. Foley*, 166 Ill. 31.

In the *Ward* case, *supra*, in which the motion to instruct for defendant was made at the close of all the evidence, without noticing the fact that the motion was not made at the time the particular evidence was offered, the court said: "It was incumbent upon the defendant to indicate and point out in what the variance consisted, so as to enable the court to pass upon the question intelligently, and also to enable plaintiff to so amend her pleadings as to make it conform to the evidence, and thus avoid defeat upon a point in no way involving the merits of her claim. Under our statute the amendment might have been instantly made, subject only to such terms as the court might have seen fit to impose, and the cause might then have proceeded as though no variance had ever existed."

In the *Foley* case, *supra*, in which a motion was made at the close of the plaintiff's testimony, the court said: "In order to raise the question of variance, it was necessary for the defendant to indicate specifically the variance and point out in what it consisted, so as to enable the court to pass upon the question intelligently, and also to enable the plaintiff to

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so amend his pleadings as to make it conform to the evidence. The defendant not having done this, but having charged a variance only in general terms, the objection must be considered as waived, and the question of variance can not be raised here." (Citing cases.)

It would therefore seem immaterial when the question of variance is called to the attention of the trial court so it is done at the trial at a time when plaintiff may avoid the variance by amendment of his pleadings.

There are cases holding that the variance must be called to the attention of the court at the time the evidence is offered, but in none of those cases does it appear that the court had under consideration the question here involved.

The claim that appellant can not now insist upon the variance because it was made in the former appeal, is not tenable because it does not appear that this court then considered that question, evidently supposing that on another trial it would be avoided by amendment.

The error complained of as to appellee's instruction may be avoided by amendment of the declaration to conform to the proof which justified this instruction.

The complaint that it was error for the court to allow testimony of the appellee as to conversations between him and his witness as to what appellant's foreman told the witness when appellee was not present, can not be sustained, because it appears that the witness and appellee were acting under the orders of the foreman in doing the work the foreman ordered them both to do. The witness was directed by the foreman to convey his order to appellee to do the work.

As to the question of assumed hazard, that was a question of fact for the jury, on which there was a conflict of evidence, and the jury found in favor of the appellee, and we are not prepared to hold that this finding was against the clear preponderance of the evidence. The same may be said as to the general verdict for appellee, had the allegations of the declaration agreed with the evidence. 58 Ill. App. 418.

As to appellant's instructions two, three and five, refused by the court, it was sufficient ground to refuse them that undue prominence was given to the words "not guilty" by using enlarged type in printing them, the remainder of the instructions being in small type about one-half the size of the words "not guilty." *Wright v. Brosseau*, 73 Ill. 381; *Hoyer v. Salsbury*, 7 Ill. App. 97.

The fourth of appellant's refused instructions was sufficiently covered by the eighth and tenth given. The sixth instruction was properly refused because in case of a promise to repair, it need not be that the promise should be of immediate repair, as is stated in this instruction: It is sufficient that the promise to repair was within a reasonable time. *Fairbank v. Haentzsche*, 73 Ill. 236; *Missouri Fur. Co. v. Abend*, 107 Ill. 51, and cases cited.

Appellant asked the court to submit the following special finding to the jury, viz.:

"Was it possible at the time the plaintiff was injured to supply him with a chisel which would chip castings, such as he was working upon, under blows of a sledge hammer wielded by a workman, and yet such chisel not chip off or break off while so in use?"

This was properly refused, because it did not embody an ultimate fact decisive of the case. *Lake E. & W. R. R. Co. v. Morain*, 140 Ill. 121, and cases cited.

The judgment is reversed and the cause remanded.

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Wallace L. De Wolf v. The Royal Trust Company et al.

1. *RECEIVERS—Can Not Contract Without the Sanction of the Court.*—A receiver is always subject to the orders of the court appointing him, and can make no contracts without the sanction of such court.

2. *SAME—Can Not Elect to Assume a Lease to the Insolvent.*—Without the sanction of the court a receiver can not elect to bind the estate of the insolvent on a lease, by his own independent action. And if a landlord desires to hold a receiver for the full term of the lease, he should promptly apply to the court when the receiver takes possession of the demised premises, when the court may order that the receiver hold the

premises for the full term of the lease or that he surrender possession to the landlord.

8. *SAME - Not Liable on Lease to Insolvent Without an Order of the Court.*—A receiver who takes possession of demised premises, and occupies them under the order of the court for a time sufficient to allow him to wind up the business of the insolvent firm, can not be held liable for rent according to the terms of the lease in the absence of any order by the court that the lease be assumed.

Intervening Petition, in receivership proceedings. Appeal from the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding. Heard in this court at the October term, 1897. Affirmed. Mr. Justice SEARS dissenting. Opinion filed December 23, 1897.

FIREBAUGH & DRAPER, attorneys for appellant.

SMITH & ELLIS, attorneys for appellees.

MR. JUSTICE WINDES DELIVERED THE OPINION OF THE COURT.

Benjamin F. Smith, sole surviving partner of the firm of Hiram P. Smith & Co., filed his bill in the Circuit Court of Cook County against Mattie C. Smith, the administratrix of Hiram P. Smith, deceased, to wind up said partnership and for the appointment of a receiver. Appellee was appointed by said court receiver, and it qualified and entered upon its duties as such October 26, 1896.

Later appellant filed two petitions, successively, asking to be made a party defendant, and the vacation of the order appointing the receiver, and for its discharge, which petitions were on hearing denied by the court.

Again, on February 10, 1897, appellant filed another intervening petition, setting forth that on April 13, 1896, he made a lease to said firm of Smith & Co. of certain store rooms and basement, known as Nos. 113 to 119 West Van Buren street, Chicago, from May 1, 1896, to April 13, 1897, at the rate of \$75 per month, payable in advance on the first day of each month of said term, commencing May 1, 1896; that said premises were and are the premises used and occupied by said Smith & Co. for carrying on all of its business; that there was due petitioner for rent of said premises from said Smith & Co., when said receiver took possession thereof, the sum of \$135.54; that when said

receiver was appointed, it immediately took possession of all of said premises, and continued to occupy and use the same under and by virtue of the terms of said lease, and that on February 1, 1897, there became due to petitioner, according to the terms of said lease, for the month of February, 1897, for rent of said premises, the sum of \$75, which still remains due and unpaid.

Said petitioner asked that said sum of \$135.54 be allowed as a claim against said estate of Smith & Co., in favor of petitioner, as one of the general creditors, and that said sum of \$75 be allowed against said receiver, and that it be paid as part of the costs of administration of said estate, and prior to the claims of the general creditors. The receiver answered said petition, and it was heard by the court on the following stipulation and notice thereto attached :

“It is hereby stipulated by and between the parties to this suit, as follows, to wit :

That the allegations in the said intervening petition of Wallace L. De Wolf contained, in reference to the amount of rent due October 1, A. D. 1896, to wit, the sum of one hundred thirty-five dollars and fifty-four cents (\$135.54), are true as alleged in said intervening petition.

It is further stipulated that all the facts in relation to the other matters alleged in said intervening petition are as follows, to wit :

That at the time of the said appointment of the Royal Trust Company receiver herein, the business of H. P. Smith & Co., the insolvent estate in these proceedings mentioned, was holding and occupying premises known as Nos. 113, 115 and 119 West Van Buren street in the city of Chicago and State of Illinois, under lease bearing date April 13, A. D. 1896, by which lease the lessor therein mentioned, the said Wallace L. De Wolf, intervening petitioner herein, had let and leased the said premises to the said insolvent firm of Hiram P. Smith & Co. from the 1st day of May, A. D. 1896, until the 1st day of May, A. D. 1897, at a monthly rental, as per the terms of said lease, of seventy-five dollars (\$75) per month, to be paid upon the first day of each month; that all of the business and assets of the said Hiram P.

Smith & Co., at the time of the appointment of the receiver herein, were situate and carried on at the said premises.

That at the time of the appointment of the receiver herein, the said receiver took possession of all of said premises mentioned in said lease under order of the court herein, and ever since said time has continued to occupy said premises under said lease, and on February 1, A. D. 1897, delivered to complainant a part of the said keys to said premises at the office of the intervening petitioner, and the balance of said keys to said premises it caused to be left at the office of intervening petitioner on February 3, A. D. 1897; that on January 22, A. D. 1897, it caused to be served upon the intervening petitioner a notice, which is hereto attached as 'Exhibit A,' and made a part hereof.

That the receiver has paid to the intervening petitioner the rent, as per the terms of said lease, from the said time it took possession of said premises up to February 1, A. D. 1897, since which time no rent has been paid for said premises; that the said leasehold estate was at the various times herein mentioned valuable to and available for the benefit of the creditors of said estate, and that the said receiver, at the time of its appointment herein, elected to take possession of said premises and occupy the same under the orders and direction of the court.

The above embraces all that ever took place between the intervening petitioner and the receiver in relation to said matter, or between the agents of either of said parties.

Dated February 16, 1897.

Smith & Ellis, solicitors for Royal Trust Company, receiver.

Firebaugh & Draper, solicitors for intervening petitioner."

"NOTICE.

In the Circuit Court of Cook County, Illinois.

Benjamin F. Smith, complainant,

vs.

Mattie C. Smith, administratrix.

To Wallace L. DeWolf :

} Bill 163,009.

You are hereby notified that the undersigned will, on January 30, 1897, surrender to you the premises heretofore

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occupied by it as receiver for the late firm of Hiram P. Smith & Co., said premises being no longer required by said receiver in administering said estate. The premises in question are known as Nos. 113, 115 and 119 West Van Buren street, Chicago. On said January 30, 1897, the keys to said premises will be surrendered at your office.

Dated January 22, 1897.

ROYAL TRUST Co.,
Receiver for Hiram P. Smith & Co.
By SMITH & ELLIS,
Attorneys."

No other evidence was introduced or heard by the court. The court allowed said claim of \$135.54 to be paid with the general creditors of said estate, but disallowed the claim of \$75 for rent of February, 1897, and found that the receiver vacated said premises prior to February 1, 1897, and surrendered the keys thereof to petitioner February 3, 1897; that the receiver in no way used or occupied said premises during February, 1897, or thereafter; that said receiver having failed to surrender said keys until February 3, 1897, said petitioner was entitled to rent for said premises up to and including February 3, 1897, amounting to \$7.25, and ordered said receiver to pay said petitioner that amount as a preferred creditor. From this last order appellant appealed. The first six assignments of error question the propriety of the orders appointing said receiver, appointing Smith & Ellis as solicitors for said receiver, denying the motion of petitioner to be made a party defendant, denying his petition asking the discharge of the receiver, and in allowing said Smith & Ellis \$50 for their services as solicitors for said receiver; but inasmuch as no appeal was taken from any order of the court except that in disallowing petitioner's claim for rent of \$75, we can not and do not consider any of said alleged errors.

The only remaining question is as to whether the court erred in refusing said claim of \$75. In the case of *Smith v. Goodman*, 149 Ill. 80, where the question was as to the liability of an assignee under a voluntary assignment for

the benefit of creditors, upon a lease to the insolvent made before the assignment, the court say: "While the assignee stands as the representative of the debtor, the purpose for which he is invested with title to the insolvent's property is that it may be collected and made available for the payment of the debts of the assignor. It might very well be that a term of years in land might be so burdened with the performance of conditions that it would be wholly valueless for any purpose of the trust. For that reason it has been uniformly held that the assignee may accept the assignment and enter upon the execution of the trust without becoming the assignee of the lease held by the insolvents, unless he elects so to do. (Citing cases.) And the assignee is entitled to a reasonable time in which to ascertain whether the leasehold estate can be made available for the benefit of creditors or not." The court further states that no general rule can be laid down as to the effect of specific acts of the assignee in determining whether there has been an election to take the leasehold property as part of the assigned estate, and says that from an examination of the adjudged cases the general principle would seem to be "that the assignee will not be held to have accepted the lease, unless it be shown that he has done so expressly, or by unequivocal acts, inconsistent with the right of entry by the landlord, has indicated an election to appropriate the leasehold estate."

In *Spencer v. Columbian Expos.*, 163 Ill. 126, it was contended that the receiver, notwithstanding the contract of the insolvent to pay a specified rent, was only bound to pay a reasonable compensation for the privileges it enjoyed in occupying premises under order of the court appointing it; but the court held the receiver liable to pay at the rate contracted for by the insolvent for the time the premises were used by the receiver, being the full time of the insolvent's contract. The receiver took possession and carried on the business of the insolvent, which the insolvent had been unable to continue, to the end of the contract, and received all the profits and benefits of such possession and continuance of the business. The court recognizes the same

rule as applicable to a receiver, which, in the Smith case, *supra*, is applied to an assignee, except the court says, that the right to elect whether he (the receiver) will perform the contract of the insolvent or not, is subject to the order of the court, and that it is so laid down by many authorities.

On the same question, in case of Quincy, etc., Railroad Co. v. Humphreys, 145 U. S. 96, the court, quoting from Gaither v. Stockbridge, 67 Maryland, 224, said: "The ordinary chancery receiver, such as we have in this case, is clothed with no estate in the property, but is a mere custodian of it for the court, and by special authority may become an officer of the court to effect a sale of the property, if that be deemed necessary for the benefit of the parties concerned. If the order of the court under which the receiver acts embraces the leasehold estate, it becomes his duty, of course, to take possession of it; but he does not, by taking such possession, become assignee of the term in any proper sense of the word. He holds that, as he would hold any other personal property involved, for and as the hand of the court, and not as assignee of the term."

And again, quoting from Sunflower Oil Co. v. Wilson, 142 U. S. 322, the court said: "The receiver did not simply, by virtue of his appointment, become liable upon the covenants and agreements of the railway company," citing cases. "Upon taking possession of the property, he was entitled to a reasonable time to elect whether he would adopt this contract and make it his own, or whether he would insist upon the inability of the company to pay, and return the property in good order and condition, paying, of course, the stipulated rental for it so long as he used it." * * * The court proceeds: "Tested by this rule, we are of opinion that these receivers did not become bound by an election, or by reason of any act of their own, or by any order of the court. The court did not bind itself or its receivers *eo instanti*, by the mere act of taking possession. Reasonable time had necessarily to be taken to ascertain the situation of affairs." See also U. S. Trust Co. v. Wabash W. Ry. Co., 150 U. S. 287; and Morrison v. Blackall, 68 Ill. App. 512.

In the latter case the extent of the landlord's contention was that the receiver was liable for the time he actually occupied at the rate fixed by the lease, the receiver having conducted the business of the insolvent in the leased premises for nearly two years, and the unexpired term of the insolvent's lease was about two years more.

That it is the general rule that a receiver is always subject to the order of the court appointing him, and can make no contracts but with the sanction of the court, is plain.

High on Receivers, § 390a, states the law in these words: "All contracts made by him, the receiver, are subject to modification by the court, and persons contracting with him are chargeable with notice of his limited powers in this regard, and deal with him at the risk of their contracts not being approved by the court."

Beach on Receivers, Sec. 257, states the same principle in these words: "Neither can he, the receiver, enter into contracts without the approval of the court. Although as receiver he may enter into negotiations and make such agreements as would be binding upon him as an individual, yet, in order to affect the funds in his hands, his acts must be ratified by the court. This rule is so well established that it has been decided that all persons contracting with a receiver are chargeable with knowledge of his inability to contract, and enter into contracts with him at their peril, and that the court has unquestioned power to modify or even vacate his agreements."

In Bispham's Equity, Sec. 580, it is stated, speaking of receivers: "His first duty may be said to be to take possession of the estate in the room and place of the owner thereof; and under the supervision of the court to manage the property so as to transfer the same, and if possible, to make it profitable for those who may ultimately be declared the owners thereof. The powers of a receiver are limited. All his actions are under the immediate control of the court, and in order to a safe custody of the estate he must continually apply to the court for its advice and sanction."

We therefore conclude that without the sanction of the

De Wolf v. The Royal Trust Co.

court the receiver may not elect to bind the estate of the insolvent on a lease, by his own independent action. It appears from this record that while the receiver occupied the demised premises, such occupancy was of advantage to the estate and was under the orders of the court, but it nowhere appears that he elected to take the lease as an asset of the estate, or that the sanction of the court went further than to approve of the action of the receiver in retaining the demised premises so long as such detention was of advantage to the estate.

It was equitable that the receiver should pay for the premises rent at the rate specified in the lease for the time he actually occupied the same, which was done. If the landlord had desired to hold the receiver for the full term of the lease, he should have promptly applied to the court when the receiver took possession of the demised premises, when the court, if it was thought it would be of advantage to the estate that the receiver hold the demised premises for the full term of the lease, could so direct, and then the liability of the receiver would be unquestioned; or if that was not deemed to be advantageous to the estate, the court could have directed the receiver to give possession to the landlord. It is too late, under the circumstances shown in this case, for the landlord, he having taken no action toward determining his relations to the receiver, to now claim that the receiver is liable for rent according to the terms of the lease, simply because the receiver took possession of the same and occupied, under the orders of the court, for a time sufficient to allow him to wind up the business of the insolvent firm.

The order and decree of the Circuit Court is affirmed.

Mr. Justice SEARS, dissenting.

I do not concur in the conclusion reached by a majority of the court.

That the receiver here should be permitted to "elect" to retain the premises under the lease and occupy them for more than one-half of the term remaining unexpired when

he took possession as receiver, and then to "elect" to abandon the tenancy, seems to me to be inequitable in principle, nor do I think it supported by authority.

There can be no question as to the well established general rule that the receiver may not incur obligations, and thereby bind the estate, without the consent of the court which has made him its officer.

Neither can the rule be questioned which gives to the receiver—acting, of course and always, under the direction of the court—a reasonable time, during which he may retain premises formerly held by the insolvent under lease, without making himself, as receiver, privy to the lease or obligated under the terms of the tenancy, for the purpose of electing, within such reasonable time, whether it will be of benefit to the estate to accept the tenancy and treat the leasehold as an asset of the estate, either for sale as an asset, or for use in carrying on the business of the estate.

This rule is announced in *Morrison v. Blackall*, 68 Ill. App. 504, in the following terms: "We regard the rule to be that a receiver or an assignee of an insolvent may accept the trust conferred upon him without becoming the assignee of any lease held by the insolvent. Whether such assignee or receiver will become the assignee of or bound to pay rent provided in a lease held by the insolvent, is for the assignee or receiver to determine. He has a right to elect what he will do in this regard, and, if the landlord takes no action, a reasonable time within which to make such election. If he continue to remain in occupancy of the demised premises beyond such reasonable time, he will be presumed to have elected to accept the lease, and will be bound to pay the rent provided thereby."

In *Smith v. Goodman*, 149 Ill. 75, the court, in commenting upon this rule, say: "It is undoubtedly the rule that the assignee must make his election within a reasonable time, and will not be permitted to continue in the occupation of the premises unreasonably."

In *Spencer v. Columbian Ex.*, 163 Ill. 127, the court say: "The general principle contended for by appellant that a

receiver has, subject to the order of the court, the right to elect whether he will perform the contract or not, and is entitled to a reasonable time after taking possession in which to make such election, is not denied. It is so laid down by many authorities. (Citing cases.) But we have been referred to no case holding that when the lease or contract is of itself a thing of value to the creditors, and the receiver, under the order of the court, takes possession of the premises and conducts the business which the insolvent has been unable to continue, and, without any act of disaffirmance or notice that he would not be bound by the contract, completes the time and receives the profits and all the benefits from such possession and continuance of the business, the receiver may then repudiate the contract, and pay only on the basis of a *quantum meruit*." * * * And the court continues, quoting from *Smith v. Goodman, supra*: "There is not entire uniformity of decisions as to when the assignee will be held to have accepted the lease and bound himself to perform its covenants, and no general rule can be laid down as to the effect of specific acts of the assignee in determining whether there has been an election to take the leasehold as a part of the assigned property. An examination of the adjudged cases is valuable only as fixing the general principle by which the case is to be governed, which would seem to be that the assignee will not be held to have accepted the lease unless it be shown that he has done so expressly, or, by unequivocal acts inconsistent with the right of entry by the landlord, had indicated an election to appropriate the leasehold estate.' No reason is presented why the receiver may not either expressly elect, or, by unequivocal acts inconsistent with the right of entry by the landlord, indicating an election to appropriate the leasehold estate, be held to have done so impliedly, without any act on the part of the landlord putting the court or the receiver to an election."

Nothing inconsistent with this announcement of the rule by our Supreme Court is found in *Sparhawk v. Yerkes*, 142 U. S. 1; *Sunflower Oil Co. v. Wilson*, 142 U. S. 313; *Quincy, etc., R. R. Co. v. Humphreys*, 145 U. S. 82.

In *U. S. T. Co. v. Wabash W. Ry. Co.*, 150 U. S. 287, the court say: "The general rule applicable to this class of cases is undisputed, that an assignee or receiver is not bound to adopt the contracts, accept the leases, or otherwise step into the shoes of his assignor, if in his opinion it would be unprofitable or undesirable to do so; and he is entitled to a reasonable time to elect whether to adopt or repudiate such contracts. If he elect to adopt a lease, the receiver becomes vested with the title to the leasehold interest, and a privity of estate is thereby created between the lessor and the receiver, by which the latter becomes liable upon the covenant to pay rent."

From these decisions it is apparent that the rule as established contains these well defined propositions:

1st. That the protected occupancy of the receiver during a reasonable time is for the purpose only of enabling him to elect whether the leasehold will be of benefit to the estate.

2d. That such occupancy ends and privity of contract under the lease begins the moment such election is made, if it be an election to retain.

3d. If without any express election the receiver remain in occupancy beyond a time reasonable for the purpose of election, he thereby impliedly elects to retain, and becomes obligated as receiver under the terms of the lease.

4th. Such implied election by occupancy is presumed to be with consent and by direction of the court, if the receiver remains in occupancy to carry on the business of the estate under direction of the court.

In the case here under consideration, we have a stipulation as to facts, a part of which is as follows:

"That the receiver has paid to the intervening petitioner the rent, as per the terms of said lease, from the said time it took possession of said premises up to February 1, A. D. 1897, since which time no rent has been paid for said premises; that the said leasehold estate was at the various times herein mentioned, valuable to and available for the benefit of the creditors of said estate, and that the said receiver, at

the time of its appointment herein, elected to take possession of said premises, and occupy the same under the orders and direction of the court."

At the time when the receiver took possession of the premises, covered by the lease from petitioners to insolvent, there remained of the unexpired term less than six months. The receiver occupied and paid rent according to the terms of the lease for more than three months, *i. e.*, for more than one-half of the unexpired term.

It is obvious from this stipulation that the receiver occupied, not alone by his right to hold for a reasonable time, and upon a *quantum meruit* without regard to the terms of the lease, but that he occupied and paid rent upon the terms of the lease. Having so occupied, and for more than half of the unexpired term of the lease, he should be held to have impliedly elected to take the place of the insolvent under the lease. *Morrison v. Blackall, supra; Spencer v. Columbian Ex., supra.*

But aside from this implied election we have here the stipulation stating plainly that he did expressly so elect, and stating further that it, "the said leasehold estate" (not a fractional part of it), was, at the various times herein mentioned, "valuable to and available for the benefit of the creditors of said estate."

I am unable to find any case holding that the receiver may occupy at caprice the leasehold property beyond such reasonable time, or beyond the making of such election. The reasoning of all the cases clearly is, that the holding without assuming any liability under the lease is for one purpose only, *viz.*, to determine whether the leasehold will be of benefit to the estate as an asset or for occupancy, and can never be beyond the making of such determination by election or the expiration of a reasonable time therefor.

That occupancy for the purpose of carrying on the business of the insolvent, such business being carried on by permission of the court, creates a presumption that the court approved the election, seems too clear to be controverted. Unless this were so, none of the cases cited could hold an implied election possible.

The rule surely gives no power to the receiver, whether acting under a specific order of court, or by its implied permission, to play fast and loose with the lessor, by electing to treat the leasehold as of value to the estate, remaining in occupancy under the lease for a part of the term, thereby becoming party to the lease, and then capriciously to elect again to nullify the contract and leave the lessor without remedy.

The giving of the eight-day notice by the receiver to petitioner, the landlord, could in no event affect the legal status of the parties. If no privity under the lease had been created it was entirely unnecessary; and if such privity was created it could affect nothing.

Nor was it necessary after an election by the receiver that the landlord should demand an election, nor could such demand by the landlord be of any importance as affecting an implied election by the receiver by holding beyond a reasonable time. *Smith v. Goodman, supra.*

I am of opinion that the order of the Circuit Court should have been reversed and the cause remanded with directions to allow the prayer of the intervening petitioner upon the stipulated facts.

CASES
IN THE
APPELLATE COURTS OF ILLINOIS.

THIRD DISTRICT—MAY TERM, 1897.

George C. McFarland v. Annie H. McFarland.

1. **FREEHOLD**—*In a Suit for Partition.*—A freehold is involved in a proceeding in partition to divest the title of parties who hold lands as tenants in common, and place it in the purchaser at a judicial sale.

Bill, for partition. Appeal from the Circuit Court of Morgan County; the Hon. CYRUS EPLER, Judge, presiding. Heard in this court at the May term, 1897. Appeal dismissed. Opinion filed December 2, 1897.

J. O. PRIEST, attorney for appellant.

JOHN A. BELLATTI and E. P. KIRBY, attorneys for appellee.

MR. JUSTICE GLENN DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree entered in the Circuit Court of Morgan County, for the sale of certain real estate therein mentioned. The amended bill filed was for the partition of this real estate, and incidentally to establish the lien of a mortgage and a note. The court, upon the hearing, ordered the premises sold, without appointing commissioners, as it was apparent that the premises could not be divided according to the respective interests of the parties without manifest injury.

The appellees filed their motion to dismiss the appeal to

this court, because a freehold is involved. This motion must prevail. This is a proceeding in partition to divest the title of the parties who now hold the same as tenants in common—place it in the purchaser at a judicial sale. *Carter et al. v. Penn*, 99 Ill. 390; *Bangs et al. v. Brown et al.*, 110 Ill. 96; *Lequatte v. Drury*, 6 Ill. App. 389; *Johnson v. Johnson*, 7 Ill. App. 521.

It is contended by the solicitor for appellant that as there are other questions involved than a freehold the motion to dismiss the appeal should be denied. This contention is not sustained by the authorities.

Appeal dismissed.

Township of Whitley v. Jerry Linville.

1. **FREEHOLD—Perpetual Easement.**—A perpetual easement or any interest in land in the nature of such an easement when created by grant, or by any proceeding which is in law equivalent to a grant, constitutes a freehold.

2. **SAME—When Involved.**—A suit brought to recover a penalty, but which involves the direct question of the perpetual right of the public to travel over the land of the owner of the fee, involves a freehold.

Action, to recover a penalty for obstructing a highway. Appeal from the Circuit Court of Moultrie County; the Hon. EDWARD P. VAIL, Judge, presiding. Heard in this court at the November term, 1897. Appeal dismissed. Opinion filed December 2, 1897.

R. M. PEADRO, attorney for appellant.

J. R. & WALTER EDEN, attorneys for appellee.

MR. JUSTICE GLENN DELIVERED THE OPINION OF THE COURT.

This suit was brought by the township of Whitley against Jerry Linville, to recover a penalty for obstructing a highway by encroaching on the same with a fence, under Chap. 121, Secs. 71 and 74, Rev. Stat. (1895). Upon the trial

in the justice's court judgment was rendered against Jerry Linville for \$3 and costs of suit. From this judgment he took the case to the Circuit Court by appeal. In the Circuit Court judgment was rendered in favor of Jerry Linville, the present appellee. The township of Whitley, the present appellant, brought the case by appeal to this court. The appellee enters his motion in this court to dismiss the appeal on the ground there is a freehold involved, and that the appeal should have been taken from the Circuit to the Supreme Court instead of to this court.

The appellee owns the fee of the land and disputes the existence of a highway where he has placed his fence. The appellant contends that the highway exists by prescription.

This suit, though brought to recover a penalty, yet involves the direct question of the perpetual right of the public to travel over the land of the owner of the fee. By this contention the appellant claims a perpetual easement in the land of appellee.

A perpetual easement in lands, or any interest in land in the nature of such easement, when created by grant or by any proceeding which is in law equivalent to a grant, constitutes a freehold. *Chaplin v. Com'rs of Highways*, 126 Ill. 264.

The Supreme Court said in the case of *Town of Brushy Mound v. McClintock*, 146 Ill. 643, which is "on all fours" with this case, "the right of the town to the recovery of the penalty depends upon the determination of the issue—affirmed on one side by appellant, and denied on the other by appellee—whether or not the public has the interest of a perpetual easement in the highway passing over appellee's grounds."

As the decision of this case involved necessarily the decision of this issue, we think that a freehold is involved.

The motion to dismiss the appeal is sustained, and the appeal dismissed.

Chicago & Alton R. R. Co. v. Patterson & Johnson.**Chicago & Alton R. R. Co. v. Charles W. Bramlett.**

1. **PRESUMPTIONS**—*Which Arise Upon Proof of Conditions.*—Proof of a certain state or condition of things at a given time will raise a presumption of fact strong enough to support a finding that it continued for a longer or shorter time thereafter, or until shown to be changed according to the nature and surroundings of the subject.

2. **RAILROADS**—*Negligence—When Not to be Imputed in Killing Stock.*—Negligence can not be imputed to a railroad company in killing stock, on account of the manner in which its employes operate the train, when they do everything in their power after the discovery of the stock upon the track to save it from injury.

Trespass on the Case, for killing stock. Appeal from the Circuit Court of Sangamon County; the Hon. JACOB FOUKE, Judge, presiding. Heard in this court at the May term, 1897. Reversed. Opinion filed December 2, 1897.

STATEMENT OF THE CASE.

These cases come to this court together, upon stipulation of all the parties, as they were tried together both in the police magistrate's court and the Circuit Court, upon the same evidence and before the same juries, the facts in both cases being practically the same.

The track of appellant, south of Auburn, Illinois, runs through a tract of land belonging to one Kessler, who has a private crossing across the track for his own convenience. The fences along the sides of the right of way were in good condition, as were the gates at the crossing. On the east of the right of way is a field of Kessler's, fenced on the east side, and joining on a public road, across which is a farm, which, at the time of the transaction in question, was occupied by C. W. Bramlett, who is the appellee in one of these suits. Patterson & Johnson, the appellees in the other suit, owned a colt, which they put out to pasture on Bramlett's place, and Bramlett himself owned a colt, both of which animals, just previous to the accident out of which these suits grew, were in Bramlett's pasture. The gate of

this pasture on the day in question was left open, and the animals wandered out into the public road, where they went through an open gate at the Kessler crossing upon the right of way of the appellant.

At the Kessler crossing the track is on a level with the ground, but thirty or thirty-five yards north from there the ground rises, and the track then runs in a cut, varying in depth, for about forty rods. On the east side, the railroad track is about thirty feet from the fence, which is lower than the crest of the bank, from three to five feet. The track at this point runs nearly north and south for some distance.

On the 25th day of July, 1893, the "Limited" was going north at a speed of about fifty miles per hour. The engineer saw three horses coming over the embankment about five hundred feet ahead of the engine. He applied the air, whistled, and the automatic bell ringer was sounding the bell. It was impossible to stop the rapidly moving train in such a short distance, and as the three horses ran across the track, the engine struck the one in the rear. The leading horses scrambled up the opposite bank, which was from ten to twelve feet high, and quite steep, and disappeared. Immediately after the collision Bramlett's horse was found dead, at the side of the track, a rod or two north of the Wheeler crossing. The seven wire fence, about five feet high, on the west side of the track, was found broken down, the wires having blood and hairs on them. Hillyard's horse was found uninjured. The horse of appellees Patterson & Johnson had run about a quarter of a mile through a cornfield, and there dropped with two broken legs. It was shot.

Right after the collision, the gate was found open and propped back with a board. It was a good gate and had a good fastening; a chain locked around the head of the gate and slipped over the post. The last time the gate was seen by any of the witnesses who testified in the case, was about ten days before the horses were killed, and it was then shut.

PATTON, HAMILTON & PATTON, attorneys for appellant.

Railroad companies are only required to use reasonable care and diligence to keep gates closed at farm crossings. If opened by strangers and left so, the company is only liable when chargeable with notice, actual or constructive, of the fact that the gate was open. Rorer on Railroads, 647; Am. & Eng. Ency. Law, Vol. 7, 915 *et seq.*; Pierce on Railroads, 1543.

There can be no negligence imputed to appellant so far as the running of the train was concerned, for the evidence shows that the driver of the engine did everything in his power, after discovering the stock, to save it from injury, and this, under the law, is all that is required of him. Illinois C. R. R. Co. v. Noble, 142 Ill. 578; Delta Elec. Co. v. Whitcamp, 58 Ill. App. 141.

R. H. McANULTY, attorney for appellees.

MR. JUSTICE GLENN DELIVERED THE OPINION OF THE COURT.

The foregoing statement is a fair epitome of the legitimate evidence as appears from the record.

"Proof of a certain state or condition of things at a given time will raise a presumption of fact strong enough to support a finding that it continued for a longer or shorter time thereafter, or until shown to be changed, according to the nature and surroundings of the subject." Chicago, B. & Q. R. R. Co. v. Sierer, 13 Ill. App. 261. So then if in this case the gate was seen closed on the 15th of July, 1893, and there is no evidence showing it was open until when the horses went on the track on the 25th of July, 1893, then the presumption obtains that it continued closed during all that time, and the appellant would not be guilty of negligence on account of the gate being open, when the horses went upon the right of way of the railroad company.

There is an entire absence of evidence that the appellant had any notice, either actual or constructive, that this gate was open. Unless it did have either actual or constructive notice of its condition, and time to close it before the horses

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went upon the right of way, appellant would not be liable on account of its being open. Ill. Cent. R. R. Co. v. Swearingen, 47 Ill. 206; Chicago, B. & Q. R. R. Co. v. Magee, 60 Ill. 529; Chicago & A. R. R. Co. v. Saunders, 85 Ill. 288; Ind. & St. L. R. R. Co. v. Hall, 88 Ill. 368.

There can be no negligence imputed to appellant on account of the manner in which its employes operated the train. It stands uncontradicted in the record, they did everything in their power after they saw the stock, to save it from injury. This is all the law requires. C. & A. R. R. Co. v. Saunders, *supra*; I. C. R. R. Co. v. Noble, 142 Ill. 578; Delta Electric Co. v. Whitcamp, 58 Ill. App. 141.

As there is no evidence in the case showing appellant was guilty of any negligence by which appellees were injured, we do not deem it necessary to examine the other errors assigned.

The judgments entered by the court below are reversed.

A. B. Nokes v. Alexander Mueller.

1. **TRADE-MARKS**.—*The General Rule Relating to.*—As a general rule a name, generic terms, or mere descriptive words, are not ordinarily susceptible of appropriation by an individual as a trade-mark, but this rule does not obtain where there is conclusive evidence of fraudulent design, and sufficient reason to believe the public will be misled.

Bill for an Injunction.—Appeal from the Circuit Court of Sangamon County; the Hon. JACOB FOUKE, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed December 2, 1897.

S. H. CUMMINS, attorney for appellant.

A generic name, merely descriptive of the article made or sold, or its qualities, ingredients or characteristics, and which may be applied truthfully by other makers or dealers, is not entitled to protection as a trade-mark; to constitute such a trade-mark or name as will give the first who applies the same exclusive right to its use, it must not be such as will

merely indicate the composition or quality of the article to which it is applied, or to the particular country or district where produced or manufactured. *Bolander v. Peterson*, 136 Ill. 215; see also *Apollinaris Company v. Scherer*, 27 Fed. Rep. 18; *Ball v. Siegel*, 116 Ill. 137; *Hoyt v. Hoyt*, 143 Pa. St. 623; *Mumm v. Kirk*, 40 Fed. Rep. 589.

McGUIRE & SALZENSTEIN, attorneys for appellee.

Honest and open competition is not forbidden by law, and furnishes no ground for complaint; but a simulation of the name, character, system and method of another for the purpose of deceiving the public and leading persons dealing with the usurper to suppose they are really dealing with the party whose rights are thus usurped, constitutes an offense against the rules of honesty and fair dealing which should invoke the aid of a court of equity. *Merchants' Detective Association v. Detective Mercantile Agency*, 25 Ill. App. 250; see also *McLean v. Fleming*, 96 U. S. 245; *Mossler v. Jacobs*, 66 Ill. App. 571; *Van Auken Co. v. Van Auken Steam Specialty Co.*, 57 Ill. App. 240; *Pillsbury v. Pillsbury W. F. M. Co.*, 64 Fed. Rep. 841; *Garrett v. Garrett*, 78 Id. 472; *Singer Manufacturing Company v. June Manufacturing Company*, 163 U. S. 169.

MR. JUSTICE GLENN DELIVERED THE OPINION OF THE COURT.

The appellee filed a bill for an injunction in the Circuit Court of Sangamon County, to restrain the appellant from using certain wagons in selling and delivering milk in the city of Springfield, painted in a particular style, and with certain lettering and pictures thereon. Notice of the application for an injunction was given and appellant resisted this motion. After a contested hearing the motion was allowed, and upon the order of the court the writ of injunction issued. A demurrer was filed by appellee to the bill, which upon a hearing was overruled. Answer and a replication thereto were filed. A hearing was had upon the testimony of the witnesses taken in open court before the chancellor and the injunction made perpetual.

There is no serious conflict in the evidence in this case. The facts as they appear from the evidence are substantially as follows:

Both the parties were engaged in the sale of milk in the city of Springfield, Illinois. The appellee had been engaged in this business for about sixteen years, and during all this time in supplying his customers had used wagons with the running gear painted yellow, the body brown and the tops white. In front of the entrance to the wagon on either side and on the white top, there was painted the picture of two cows, some trees, a running brook, some lilies and a fence. On the rear of the entrance, on the white top, there was painted on either side, in black letters, "Walnut Grove Dairy," and also under this lettering was the name in black letters, "Alexander Mueller." During the time appellee had been engaged in this business, he had established quite a profitable trade, and at the time this suit was brought, he had six hundred customers and was using four wagons in the delivery and sale of milk. In conducting his business he used wagons painted and with the lettering and pictures as above described. All this time his place was known as "Walnut Grove Farm."

Appellant commenced in the dairy business in the city of Springfield early in the month of February, 1895, using a wagon to deliver milk to his customers, with a black top and with no name on it. Shortly after this he bought of a man named Brown two dairy wagons, both with black tops, and on each of these was painted the words "East Side Dairy." Appellant continued to use these wagons in his milk business from the time he purchased them until shortly before the commencement of this suit, when he took them to the shop of Brand & Groenke, where appellee had his wagons painted and where he had two wagons at this time in the course of construction. Prior to this time appellant had had no work done at this shop. These wagons were painted, yellow running gear, body brown and top white. In front of the entrance on either side was a picture of two cows, a mountain, a swiss castle with a cupola, a running brook and

some lilies. In the rear of the entrance and on either side, on the white top, there was in black letters the name "Walnut Park Dairy," and under this the name "A. B. Nokes." These wagons he was using at the time of the filing of the bill in this suit. At this time appellant was living on what was known as the "Walnut Park Farm." It was owned by Richardson & Booth. He had rented it from them for one year from the first day of March, 1896. They bought it in 1890 or 1891. One of them had a sign painted with the words on it "Walnut Park Farm" and placed on a tree in the pasture. Prior to this for several years it had been known as the "Watson Farm." Since that some of the witnesses say it was as well known by the latter name as the former.

The decree entered by the court below in this case restrained the appellant from using wagons painted and with inscriptions and pictures on them similar to those on the wagons of appellee, in the sale of milk to his customers in the city of Springfield.

During the sixteen years the appellee had been engaged in business, his customers, and no doubt many others, had become familiar with the wagons from which he sold his milk. On appellant's wagons, the running gear was painted yellow, the body brown and the top white, like appellee's. The pictures on appellant's wagon were substantially like his, and the inscriptions on the sides of the white top were the same with slight alterations.

In *Lee v. Haley*, L. R., 5 Ch. App. Cas. 155, Lord Justice Giffard said: "I quite agree that they—the plaintiffs—have no property in the name, but the principle upon which the cases on this subject proceed is, not that there is property in the word, but that it is a fraud on a person who has an established trade and carries it on under a given name, that some other person should assume the same name with slight alteration in such a way as to induce persons to deal with him in the belief that they are dealing with the person who has given a reputation to the name. * * * I think the injunction has been properly granted upon the well known

principles of this court, which are applicable to all cases of this description, viz., that it is a fraud on the part of the defendant to set up business under such a designation as is **calculated to lead and does lead** other people to suppose that his business is the business of another person." This doctrine is approved and adopted in the case of Merchants' Detective Association v. Detective Mercantile Agency, 25 Ill. App. 250.

The appellee in this case in the sixteen years he has been in business, has established a large and profitable trade, and carries it on under a given name, and should be protected from those attempting to usurp his business. The wrong in this case does not consist in appellant painting the running gear of his wagons yellow, or the body brown, or the top white, etc. The wrong is in their accumulation, not in any one of them alone; but all combined are sufficient to entitle appellee to an injunction. Merchants' Detective Ass'n v. Detective Mercantile Agency, *supra*. We hold the fact that appellant painted his wagon like appellee's and the pictures and inscription thereon were substantially similar, that they were liable to mislead customers. It seems from the evidence that some persons were thus misled. Mossler v. Jacobs, 66 Ill. App. 571. We recognize the doctrine that as a general rule a name, generic terms, or mere descriptive words, are not ordinarily susceptible of appropriation by an individual as a trade-mark, such words being the property of the public. But this rule does not obtain when there is conclusive evidence of fraudulent design, and sufficient reason to believe the public will be misled. The appellant sets up as defense that what he did in painting, lettering and placing pictures on his wagons was done in compliance with the statute compelling vendors of milk in any city of this State to put upon their wagons conspicuously the name of the person vending the same and the locality from which it was obtained or produced. There is no averment in the answer or any evidence in the record that he was actuated by any such motive. It can not be maintained that appellee so impoverished the vocabulary of the English lan-

guage and so exhausted the taste and skill of the artist who lettered and painted the pictures on his wagons, that appellant was compelled to imitate his so closely. We feel constrained to hold from the facts and circumstances in proof of this case that his purpose was to usurp appellee's business and draw some of his customers to him, and would thereby injure appellee's business he had been so many years in establishing.

We think this case does not fall within the line of the authorities cited by appellant's counsel, but does within the case of the Merchants' Detective Ass'n v. The Detective Mercantile Agency, *supra*, and the cases therein cited and so liberally quoted from by the learned jurist who wrote the opinion.

The decree of the Circuit Court will therefore be affirmed.

William S. Hobson v. The People ex rel. Annie M. Druhm.

1. **BASTARDY—Intercourse with Persons Other than the Defendant.**—Evidence that other persons had sexual intercourse with the prosecutrix at or near the time the child was begotten, is competent as tending to raise a doubt as to the paternity of a bastard child.

2. **SAME—Prosecutrix Unchaste.**—The fact that the prosecutrix is an unchaste woman is not a defense in a bastardy proceeding.

3. **SAME—Intercourse after Conception.**—After conception has taken place it is immaterial who may have had sexual intercourse with the prosecutrix.

4. **SAME—Evidence Tending to Prove the Issue.**—The fact that after the prosecutrix became pregnant, and the defendant knew it, they had a conversation as to what name the child should have is competent as a circumstance showing that he thought he was the father.

Bastardy Proceedings.—Appeal from the County Court of Greene County; the Hon. JOHN C. BOWMAN, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed December 2, 1897.

HENRY T. RAINEY, attorney for appellant.

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D. J. SULLIVAN, state's attorney, and F. A. WHITESIDE, attorneys for appellees.

Although the evidence in a given case may show that "the prosecuting witness had sexual intercourse with another person than the defendant about or near the time her bastard child might have been begotten," such fact, of itself, will not acquit the defendant, provided the jury believe, from a preponderance of all the evidence, he is the father of such bastard child. *Altschuler v. Algaza*, 16 Neb. 631; *State v. Pratt*, 40 Iowa, 631; *Whitman v. State*, 34 Ind. 360.

MR. JUSTICE GLENN DELIVERED THE OPINION OF THE COURT.

The appellant was convicted, by the judgment of the County Court of Greene County, of bastardy.

It appears from the evidence there was a period of time during which gestation could have taken place, at the commencement of which appellant did have coition with the mother of the child, and no one else did at this time or afterward and before the child was born, save the appellant, and during this time gestation did take place.

This evidence the jury no doubt accepted as true, as it was their province to do, and found appellant to be the father of the child.

We think this finding is sustained by the evidence in the case.

It is claimed by the appellant that the court erred in giving the people's second, fourth, seventh and eighth instructions.

The people's second and seventh instructions are substantially the same, and the objections to them can be considered together.

By these instructions the jury are told, "although you may believe from the evidence that the prosecuting witness had sexual intercourse with another person about or near the time her bastard child might have been begotten, still such fact would not warrant the jury in finding the defendant not guilty, if you believe from a preponderance of all

the evidence in the case that the defendant is the father of such bastard child." The issue in this case is, is the appellant the father of the child? Evidence that other persons had sexual intercourse with the prosecutrix, at or near the time the child was begotten, would raise a doubt as to the paternity of the bastard child, but if it appears by a preponderance of all the facts and circumstances in proof that he was the father of the child, then a jury would be justified in so finding.

This is what these instructions mean and what they substantially say. These instructions are sustained by the authorities. *Altschuler v. Algaza*, 21 N. W. Rep. 421; *State v. Pratt*, 40 Ia. 631.

Complaint is made that the fourth and eighth instructions do not announce a correct proposition of law. By these instructions the jury are told that, notwithstanding they may believe the prosecutrix was unchaste, still if they believe from a preponderance of all the evidence, the defendant is the father of the child, they should so find. The fact that the prosecutrix is an unchaste woman is not a defense in a bastardy proceeding.

Appellant's counsel asked the prosecutrix this question: "With whom did you have intercourse after the month of August and before the birth of the child?" To this question appellee's counsel objected, and the court sustained the objection and appellant excepted, and assigns this ruling as error. After conception had taken place it made no difference who had connection with the prosecutrix. It was immaterial. The objection was properly sustained.

The objection was properly sustained to the question put to the prosecutrix by appellant: "Did you tell anybody anything about getting money out of Hobson to send your sister off?"

The question is objectionable for want of materiality, and if it were material, and asked for the purpose of impeachment, it is objectionable, because it fails to fix time, place and to whom the remark was made.

The court allowed the people to prove, over the objection

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of the appellant, that after she became pregnant and appellant knew it, that they had a conversation as to the name the child should have, and he told her if it were a girl to name it Ruth, and if a boy to call it Harry. This, appellant claims, was error. We think not.

We think this circumstance quite convincing that he thought he was the father of the child. If some one else was the father of the child he would not be interested in what name it should have.

Having disposed of all the objections to which exceptions were taken, and believing substantial justice has been done, the judgment of the County Court is affirmed.

City of Springfield v. Milton Williams.

1. INSTRUCTIONS—*Must be Taken as a Series.*—The instructions in a case must be taken as a series, and where this is done and there are other instructions in the series that cover an error complained of, it is cured.

2. SIDEWALKS—*Constructive Notice of Defects.*—Constructive notice of defects in a sidewalk is sufficient to hold the municipal authorities liable for injuries sustained by persons where such defects have existed for such a length of time that the authorities would, in the exercise of reasonable diligence, have discovered them.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Sangamon County; the Hon. ROBERT B. SHIRLEY, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed December 2, 1897.

WILLIAM E. SHUTT, JR., city attorney, and JOHN C. SNIGG and E. L. CHAPIN, attorneys for appellant.

MCGUIRE & SALZENSTEIN and JOHN L. KING, attorneys for appellee.

MR. JUSTICE GLENN DELIVERED THE OPINION OF THE COURT.
This is an action on the case, brought by appellee to recover for injuries sustained by him in consequence of the

defective condition of Dodge street, in the city of Springfield.

On the 22d day of May, 1896, appellee was driving with two horses and a wagon load of old lumber south on Fifth street. He observed an electric car coming on Fifth and he turned into Dodge street which crossed Fifth. Just as he was turning into Dodge street, the motorman sounded the gong sharply, and the horses made a lunge and started to run, and ran the wagon into a hole on Dodge street, upset the wagon, and appellee was thrown out and his leg broken. This hole was about fifty feet from the intersection of Fifth and Dodge streets, was five or six feet long, two feet wide and a foot deep. It had been permitted to exist by the city for a year. Appellee had been living in Springfield between two and three months before receiving the injury and was engaged in teaming. Dodge street was a much traveled street.

This case was tried by the court with the intervention of a jury; finding for appellee; damages assessed at \$1,000 and judgment for the same. Appellant brings the case to this court by appeal.

Three grounds are urged by appellant why this judgment should be set aside and this cause remanded :

First. The evidence fails to show that appellee, at time of receiving the injury, was in the exercise of due care.

Second. The court admitted improper evidence offered on behalf of the appellee, over the objection of appellant.

Third. That the fourth instruction given on behalf of appellee is erroneous.

First. There is some conflict in the evidence with reference to the care and prudence appellee exercised at the time of the injury, as to whether the team was a gentle team or not; whether the bridle bit of one of the horses was properly adjusted and in his mouth. These were all contested questions. We think as to each the preponderance was with the appellee. He acted as any man of ordinary prudence would act under like circumstances. The evidence sustained the finding of the jury as to this issue.

Second. The appellant introduced as a witness one Byers, who testified he was, on the evening of the accident, at appellee's house and in the room where he was, and that he heard appellee's wife say, the team, I think, had run away out in the country, or one of them; that she had told her husband he ought to get rid of this team or they would kill him. At this time appellee was lying on the floor and "suffering pain pretty badly." In rebuttal the appellee called his wife as a witness, who testified over the objection of appellant, that she did not say to Byers or any other person in the presence of her husband, that this was a runaway team or had run away before. This it is claimed by appellant was error. Even if it were error, it could not prejudice appellant. There were a number of witnesses at the time it is alleged this conversation took place, in the room where it is claimed to have occurred, who testify they were present all the time in the room, and no conversation of this character was had. There was an abundance of evidence upon which to base the finding of the jury upon this point, without the testimony of the wife of appellee. We therefore think, while this evidence may not have been proper, the admission of it was not prejudicial to appellant. *Dexter v. Harrison*, 146 Ill. 169; *Barrett v. Campbell*, 63 Ill. App. 330; *Moore Furniture Co. v. Sloane*, 64 Ill. App. 581.

Third. The fourth instruction given on behalf of appellee, which, it is urged, should not have been given, is as follows: "The court instructs the jury that when the street of a city is out of repair, and remains so for such a length of time that the public authorities of the city in the exercise of reasonable care and prudence ought to have discovered the fact, actual notice to such authorities of the condition of the street will not be necessary to hold the city liable for injury sustained by a person in consequence of the dangerous condition, if he is himself using reasonable care to avoid such injury." The office of the instruction was to advise the jury that actual notice was not necessary to hold the city liable in this class of cases, but constructive notice is sufficient, that is, if the defect had existed for such a length

of time that the city authorities should, by the exercise of reasonable diligence, have discovered the fact. It is claimed that there should have been added to this instruction this modification: "and there was time to repair the same."

The instructions must be taken as a series, and where this is done, and there are other instructions in the series that fully cover the error complained of, it is cured. There were other instructions given by the court that fully covered this question. *The Village of Mansfield v. Moore*, 124 Ill. 133.

Judgment of the court below is affirmed.

Van L. Hampton et al. v. George A. Lackens.

1. AGENCY—*An Agent Can Not Act for Both Vendor and Vendee.*
—A man can not act as the agent for both vendor and purchaser of the same property without the authority, knowledge and consent of both.

Assumpsit, for commissions. Error to the County Court of McDonough County; the Hon. CROSBY F. WHEAT, Judge, presiding. Heard in this court at the May term, 1897. Reversed. Opinion filed December 2, 1897.

ELTING & CAMP and H. C. AGNEW, attorneys for plaintiffs in error.

A person can not act as agent for both purchaser and seller and earn a compensation from each, unless by distinct arrangement between all who are concerned. 1 *Wait's Actions and Defenses*, 247; *Holcomb v. Weaver*, 136 Mass. 265; *Bollman v. Loomis*, 41 Conn. 581; *Atlee v. Fink*, 75 Mo. 100; *Rice v. Wood*, 113 Mass. 133; *Cottom v. Holliday*, 59 Ill. 176.

PONTIOUS & MICKEY, attorneys for defendant in error.

MR. JUSTICE GLENN DELIVERED THE OPINION OF THE COURT.
This case is brought to this court by writ of error to the County Court of McDonough County. Suit was brought

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by the defendant in error to recover of the plaintiffs in error commissions as a real estate agent.

It appears from the evidence in this case that the plaintiffs in error, being the owners of eighty acres of land in McDonough county, on the 8th day of January, 1895, negotiated a sale of said land to one Elias Anderson. He was to convey a quarter section of land he owned in Kansas, to plaintiffs in error, assume the payments of a mortgage for \$2,100 that was a lien on their land, and pay them \$900 in money. Upon Anderson doing this they were to convey to him the eighty acre tract they owned in McDonough county.

In negotiating and effecting this trade, the defendant in error acted as the agent of each, without disclosing to either he was acting for the other. He received of Anderson for his services \$24 (he agreed to pay him \$25). Plaintiffs in error agreed to pay him for his services in negotiating and effecting this trade for them \$50. To recover this last named sum this suit is brought. In this sale plaintiffs in error did not know at the time it was effected, that defendant in error was acting for Anderson, nor did he know that Lackens was acting for plaintiffs in error.

A man can not act as the agent of both vendor and purchaser of the same property without the authority, knowledge and consent of both the parties interested. The law does not allow him to assume relations so essentially inconsistent and irreconcilable with each other, and so much so, they can not be performed by the same person. There is danger that the interests of one or the other or both may be sacrificed, or that neither of them will enjoy the benefit of a discreet exercise of the trust reposed in the agent. It is the essence of the contract that he will use his best skill and judgment to promote the interests of his employer. This he can not do when he acts for two parties whose interests are essentially adverse. He therefore is guilty of a breach of his contract.

By not disclosing his true relations in this transaction to the parties, he is guilty of a fraud, and his contract with

plaintiffs in error is against public policy and void, and there can be no recovery on it. *Cottom v. Holliday*, 59 Ill. 476; *Farnsworth v. Hemmer*, 1 Allen 494; *Rice v. Wood*, 113 Mass. 133; *Holcomb v. Weaver*, 136 Mass. 265; *Walker v. Osgood*, 98 Mass. 348; *Fuller v. Dame*, 18 Pick. 472; *Rollman v. Loomis*, 41 Conn. 581; *Atlee v. Fink*, 75 Mo. 100.

Judgment of court below is reversed.

Springfield Iron Co. v. Michael McIntyre.

1. *CONTRACTS—A Contract Construed.*—Where an employe of an iron company, who sustained an injury, agreed to accept four dollars per week in orders on the company's store until he had sufficiently recovered to return to his work, in satisfaction of all claims for damages which he had against the company on account of such personal injuries, *it was held*, that the contract should be construed as meaning that the payments should not cease until such employe had sufficiently recovered to return to work of a like character to that which he had been engaged in.

2. *CONSTRUCTION OF CONTRACTS—A General Rule.*—In construing a contract reference must be had to the circumstances surrounding the parties at the time it was entered into.

3. *CROSS-ERRORS—Abandonment of.*—Where an appellee assigns cross-errors, and in his brief asks the court to affirm the judgment appealed from, he will be deemed to have abandoned his assignment of cross-errors.

Assumpsit, on a contract. Appeal from the Circuit Court of Sangamon County; the Hon. JAMES A. CREIGHTON, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed December 2, 1897.

CONKLING & GROUT, attorneys for appellant.

GRAHAM & MILLER, B. GALLIGAN and GEORGE A. WOOD, attorneys for appellee.

MR. JUSTICE GLENN DELIVERED THE OPINION OF THE COURT.

This was an action in assumpsit brought by appellee, Michael McIntyre, against the Springfield Iron Company, to

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the September term, 1896, of the Sangamon County Circuit Court. The case was tried by the court without the intervention of a jury. Appellee recovered judgment against the appellant for \$32, being \$4 per week for the eight weeks the appellant was found to be in arrears under their contract with the appellee, from which judgment the Springfield Iron Company prosecutes its appeal to this court. The facts upon which the court rendered judgment against appellant are as follows: On the 29th day of April, 1893, the appellee, while in the employ of the appellant, received a crush wound of the arm, nearly severing the arm and fracturing the lower bones. The arm was nearly severed between the elbow and the shoulder, from which injury it has become shriveled and the motion of the hand entirely lost, the arm drawing up and becoming stiff from the injury to the nerves. The result of the injury is, the appellee is unable to grasp anything; that the use of his fingers is entirely lost. At the time of the injury, to wit, on the 29th day of April, 1893, the following contract was entered into between the appellant and the appellee, to wit:

“In consideration of the Springfield Iron Company paying my hospital bill and doctor's bill, amounting to \$32, and the payment to me of \$8 in store orders and car tickets, the receipt of which is hereby acknowledged, and the further agreement of the Springfield Iron Company to pay me \$4 per week in orders on their store until my arm may have sufficiently recovered for me to return to work, I hereby agree to accept and do accept the same, as evidenced by my signature hereto, in full satisfaction of all claims for damages I now have or may hereafter have against said company on account of personal injuries received by me at the works of said company on or about the 29th day of April, A. D. 1893. Signed, Michael McIntyre.”

The only subject of contention in this case is, what construction should be put on that clause in the written contract which provides for the payments until his arm may have sufficiently recovered for him to return to work, the appellant contending that when he was able to do any kind of work, then his arm had sufficiently recovered for

him to return to work, within the meaning of the contract. This, we think, does violence to the language of the contract. In construing this it must be done in the light of the facts and circumstances surrounding the parties at the time it was entered into. The appellee at the time he received this injury was a man finely developed physically and in good health. The parties doubtless contemplated that he would regain the use of his arm substantially as it was before the injury, and to avoid litigation and to secure to appellee compensation for the injury he suffered from the negligence of appellant, entered into this contract. He was working for appellant whenever there was work to do, without any definite time as to his engagement. He was doing the heaviest of manual labor, breaking castings with a sixteen-pound sledge, taking out cinders from the furnace, wheeling ore, and using the shovel and pick. From these facts and circumstances it is not unreasonable to construe the contract as meaning that the payments should not cease until he had sufficiently recovered to return to work of a like character to that he had been engaged in, or at least to work coming within the scope of manual labor. This, to us, seems to be a reasonable construction of the contract. Any other would not give him compensation for the injuries he had sustained.

It is clear from the evidence that he is not able to return to any kind of manual labor with his arm. His arm is shriveled up, the motion of his hand is lost, his arm drawn up and stiff from injury to the nerve. He suffers pain constantly. The heat causes his fingers to swell and the cold shrinks them. There is nothing in the contract that indicates that it was the intention of the parties that appellee should return to work for appellant when his arm had sufficiently recovered for him to return to work. Had that been the intention it should have been so stated in the contract.

In their brief counsel for appellee asks this court to affirm the judgment of the court below. From this we take it, they have abandoned their assignment of cross-errors. Judgment affirmed.

Cribben, Sexton & Co. v. James Hicks, Assignee.

1. **TRIALS BY THE COURT—*When Conclusive.***—The findings and judgment of a trial court, trying a cause without a jury, are conclusive.

Voluntary Assignment Proceedings.—Appeal from the County Court of Piatt County; the Hon. F. M. SHONKWILER, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed December 2, 1897.

W. E. LODGE, attorney for appellants.

M. R. DAVIDSON, attorney for appellee.

MR. JUSTICE BURROUGHS DELIVERED THE OPINION OF THE COURT.

On June 29, 1896, appellants, by their salesman, Smith, sold to David Walker, a merchant at Monticello, Piatt county, Illinois, a lot of stoves, which were delivered to him at his town on August 11, 1896. On August 26, 1896, David Walker assigned to appellee for the benefit of his creditors. After said assignment, and after appellee, as such assignee, had taken possession of the stoves in question in this case, being the same stoves sold by appellants to said Walker, appellants presented to the County Court of Piatt County their petition for an order of that court on appellee, as assignee of David Walker, to surrender said stoves to them on the ground that Walker, by false and fraudulent statements and representations in regard to his worth, commercial standing, assets and liabilities, made to the salesman of appellants at the time of the sale, had procured them to sell and deliver said stoves to him a short time before he made said assignment; and upon appellants discovering the falsity of said statement and representations, they had elected to rescind said sale and retake said stoves.

Upon said petition of appellants being heard by the County Court, the salesman of appellant, who sold said stoves to

Walker, and Walker, were witnesses and testified, and it appears they were the only persons present when said sale was made. They differ materially as to what was said when the stoves in question were purchased by Walker, and if we are to believe Walker's version of what took place, then appellants have not proven, by a preponderance of the evidence, the material facts of their petition.

The judge of the County Court, who tried this proceeding, saw both Walker and Smith, the salesman of appellants, and having observed their manner while testifying, could better conclude as to which remembered correctly what was said when the stoves were sold. From their evidence in this record we believe the trial judge found in accordance with the truth, and we will not disturb his findings and judgment. The judgment of the County Court of Piatt County in this proceeding is affirmed.

Cleveland, C., C. & St. L. Ry. Co. v. F. M. Hall.

1. ERROR—*When Substantial Justice has been Done.*—When substantial justice has been done the judgment of the court below will be affirmed.

Trespass on the Case, for killing stock. Appeal from the Circuit Court of McLean County; the Hon. THOMAS F. TIPTON, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed December 2, 1897.

F. Y. HAMILTON, attorney for appellant; JOHN T. DYE, of counsel.

ROWELL, NEVILLE & LINDLEY, attorneys for appellee.

MR. JUSTICE BURROUGHS DELIVERED THE OPINION OF THE COURT.

On March 4, 1896, appellee commenced this suit before a justice of the peace on the following account:

		" Danvers, Illinois,
C., C., C. & St. L. Ry. Co.,		March 13, 1896.
1893.		To F. M. Hall, Dr.
Nov. 7 and 8.	To 30 rods fence (Devalm farm)...	\$ 22.50
"	30	"19.50
November 8,	100 rods fence (Barnard farm).....	75.00
1894.		
Aug. 10.	To meadow, pump and fence.....	10.00
"	" manure, hedge, rail fence.....	15.75
1895.		
June 25.	To kill three male pigs.....	10.00
		<u>\$152.75 "</u>

Upon trial before the justice, appellant did not appear, and judgment was rendered against it for \$150 and costs. Appellant appealed from the justice's judgment to the Circuit Court of McLean County, where, upon trial in that court, judgment was rendered for \$107.50 and costs; from which judgment appellant brings the case to this court by appeal, and in its brief filed herein, insists that appellee did not prove a right of recovery for the pigs killed.

Upon examination of the evidence in this record, we are satisfied the proof was sufficient to support the judgment for the pigs killed.

Appellant also in its brief contends that there is no proof that any of the fires complained of were communicated by any locomotive engine while upon or passing along the railroad of appellant. But the record contains ample evidence to sustain the judgment for injury caused by fires communicated from appellant's locomotive engine on its railroad passing through the farms of appellee.

Appellant complains of the instructions given to the jury by the trial court at the request of appellee, but upon examination of these instructions complained of, as they are contained in the record in this case, we fail to find that any of them contain reversible error. Upon the whole record, we think substantial justice has been done in this case to the parties by the judgment rendered herein by the Circuit Court of McLean County, hence we affirm it.

C. D. Myers v. Samuel Perry.

1. NOTICE—*What is Sufficient to Put Upon Inquiry.*—A mortgage of lands properly on file in the recorder's office, from the descriptions of the lands in which, the "township" was inadvertently omitted by the scrivener who drew it, is nevertheless sufficient to put judgment creditors of the mortgagor upon inquiry as to what particular lands the parties to the mortgage in question intended to have it apply.

2. SAME—*Matters Sufficient to Put a Party Upon his Guard.*—Whatever is notice enough to excite attention and put a party on his guard and call for inquiry, is notice of everything to which such inquiry might have led, and every unusual circumstance is a ground of suspicion and prescribes inquiry.

Bill, to foreclose mortgage and for relief. Appeal from the Circuit Court of McLean County; the Hon. THOMAS F. TIPTON, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed December 2, 1897.

STATEMENT OF THE CASE.

On the 2d day of September, 1895, William Schweiman being the owner thereof, attempted to mortgage to Samuel Perry, the following described real estate, to wit:

Lots nine (9) and seventeen (17), in the subdivision of the northwest quarter of section twenty-nine (29), and also the south half of the northeast quarter of the northeast quarter of section thirty (30), except therefrom six and eighty-hundredths (6 80-100) acres off of the west side, *all in township twenty-four (24) north*, range one (1), east of the third principal meridian, in McLean county, Illinois. But by a mistake of the party drawing the mortgage, the italicized words in the above description were omitted.

On the 11th day of September, 1895, this mortgage was filed for record and recorded in book 149 of mortgages, page 545, in the recorder's office of said McLean county.

While the title to the above described real estate continued to be unchanged, appellant, on October 6, 1896, obtained a judgment against said William Schweiman in the County Court of said McLean County and placed an execution issued thereon in the sheriff's hands.

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On October 19, 1896, appellee filed his bill in chancery to foreclose the said mortgage and in the same proceeding sought to correct the mistake in the description of the land described therein, so as to supply the number of the townships, and to subject the land to sale under his mortgage, claiming that his mortgage as corrected, was a prior and first lien on the premises above described, and making appellant a party.

To the bill, appellant filed his answer, setting up his judgment, its amount, date, etc., and asked the court to decree that it have such priority to said mortgage as the law entitled it to. Afterward the cause was referred to the master, and finally came to a decree, in which the court corrected the description in appellee's mortgage and held that it was a prior and first lien on the real estate above described and should be first paid in full, and that appellant's judgment lien was junior thereto.

From this decree appellant appeals and brings the case to this court.

JESSE E. HOFFMAN, attorney for appellant.

As against subsequent incumbrancers a mistake in a deed will not be corrected, without clear and positive averments, supported by positive proof. *Bent v. Coleman et al.*, 89 Ill. 364.

A judgment creditor has the same rights as against a prior unrecorded deed or mortgage as a purchaser. Without notice both are protected. *Massey v. Westcott et al.*, 40 Ill. 160; *Guiteau v. Wisely*, 47 Ill. 433.

Unless notice can be brought home to a judgment creditor, before his lien attaches, the complainant's case must fail. And further, in the same case, "The judgment lien attaches to whatever interest the record shows in the judgment debtor, in the absence of *actual notice* from other sources; and is not restricted to what the debtor really *owns*." *Massey v. Westcott*, 40 Ill. 160.

The judgment lien having been perfected before that of the mortgage, was thereby entitled to priority. *Guiteau v. Wisely*, 47 Ill. 433.

WELTY & STERLING, attorneys for appellee.

A judgment creditor has no equities superior to a *bona fide* purchaser, and whatever notice will affect the latter must in like manner affect the former. *Milmine v. Burnham*, 76 Ill. 362; *Citizens Nat. Bank v. Dayton*, 116 Ill. 257.

A party having notice of such facts as would put a prudent person on inquiry, is chargeable with notice of other facts to which by diligent inquiry and investigation he would have been led. *Citizens Nat. Bank v. Dayton*, 116 Ill. 257; *Bent v. Coleman*, 89 Ill. 364; *Russell v. Ranson*, 76 Ill. 167.

Whatever is notice enough to excite attention and put a party on his guard and call for inquiry, is notice of everything to which such inquiry might have led, and every unusual circumstance is a ground of suspicion and prescribes inquiry. *Russell v. Ranson*, 76 Ill. 167; *Merrick v. Wallace*, 19 Ill. 486.

MR. JUSTICE BURROUGHS DELIVERED THE OPINION OF THE COURT.

In this proceeding appellee seeks to correct a mistake in the description of the land described in his mortgage, as made and recorded, by having supplied the number of the township, which was omitted by mistake of the scrivener, and when so corrected to have the court decree that the indebtedness secured by his mortgage be the first lien upon said land, from the date of the recording of the mortgage. The court below having decreed appellee the correction and first lien as sought by him, appellant asks this court to reverse so much of said decree as gives appellee priority of lien on his mortgage indebtedness over the lien of his judgment and execution, as his lien was perfected before appellee filed his bill herein to have said correction made. Therefore the only question presented by this record is the right of appellee to the priority of lien given him by said decree as against appellant.

No actual notice of the omission in the description of the premises is shown to have been given appellant, by the

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evidence in this record, before appellee filed his bill in the court below, except that which the law would charge him with, upon the inspection of the recorded mortgage containing the omission. It is contended by appellant that the rule that "what is sufficient to put a party on inquiry is notice of whatever the inquiry would have disclosed," has no application where there is no actual notice, but the rule applies only to actual and not to constructive notice; while the appellee contends that the rule that should be applied to the facts in this record is that "whatever is notice enough to excite attention and put a party on his guard and call for inquiry, is notice of everything to which such inquiry might have led, and every unusual circumstance is a ground of suspicion and prescribes inquiry;" and that constructive notice of these facts is sufficient. When we examine the description in this mortgage as written and recorded, it will occur to the mind of any reasonable person that without supplying some township to the description of the premises as therein set forth, no particular land is in fact described; but from the entire mortgage, as written and recorded, the parties thereto did in fact intend to describe therein some particular land. In the chain of title to the particular land in question in this proceeding, the land records of McLean county disclose, as shown by the evidence in this case, that appellee had conveyed this land in question a short time before this mortgage was made, to the mortgagor, and he, the mortgagor, had given appellee a mortgage thereon, which mortgage was satisfied the same day that the mortgage in question was made. These facts, we think, were sufficient to put appellant upon inquiry as to what particular land the parties to the mortgage in question intended to have it apply; and he ought to have made inquiry of appellee as to the matter, and had he so applied to appellee he would have doubtless ascertained from him that the land in question was the land intended to be described in this mortgage. See *Merrick v. Wallace*, 19 Ill. 486; *Bent v. Coleman et al.*, 89 Ill. 364; *Bank v. Dayton*, 116 Ill. 257; *Russell v. Ranson*, 76 Ill. 167. Appellant

presses upon our attention the case of *Munford v. McIntyre*, 16 Ill. App. 316, and insists it is decisive of this case, but as we view it, that case was properly decided and does not militate the least against what we hold in this case; there the mortgage described perfectly a tract of land in section thirteen and it was sought to correct the mortgage as against subsequent creditors without notice and make the mortgage apply to land in section twelve; and the Appellate Court of the Fourth District properly held that it could not be done, because the mortgage in question in that case, and the record thereof, showed a perfect description, therefore it contained nothing to excite suspicion and thus put the judgment creditors in that case upon inquiry. We are also referred by appellant to the case of *Battenhausen v. Bullock*, 11 App. 665, which was affirmed in 108 Ill. 28. In that case it was sought, as against a subsequent *bona fide* purchaser for value, to correct a deed of trust, which failed to give any amount of indebtedness which it secured, so as to make it secure a \$6,000 note not described in the deed of trust, and the Appellate and the Supreme Court both properly held this could not be done, because the policy, if not the letter of our statutes, requires in all cases of mortgages and deeds of trust, that a statement therein and upon the record thereof, of the amount of indebtedness secured, should be made, and many evils are pointed out in the opinion of the Supreme Court in that case, that would arise if such statement of the amount of indebtedness secured was not required to be made in the mortgage and upon the record, to bind subsequent purchasers and judgment creditors without actual notice.

The case is clearly distinguishable from this case, in principle, we think, and therefore is not applicable to this case.

For the reasons above, we affirm the decree of the court below in this case. **Affirmed.**

Meredith Rice v. Joseph Aleshire.

1. **PLEADING—*Justification in Slander.***—A plea of justification in slander must be as broad as the charge in the declaration.

2. **PRACTICE—*Carrying a Demurrer Back to the Declaration.***—A trial court will not be justified in carrying a demurrer to a plea back to a declaration, when the defendant has filed a plea of the general issue.

Case, for slander of one in his profession. Appeal from the Circuit Court of Adams County; the Hon. OSCAR P. BONNEY, Judge, presiding. Heard in this court at the May term, 1897. Reversed and remanded with instructions. Opinion filed December 2, 1897.

W. L. VANDEVENTER and S. B. MONTGOMERY, attorneys for appellant.

The fundamental rule is that the plea of justification must be as broad as the charge, and justify the very identical charge and in the alleged sense of the charge. 1 Hilliard, Torts, 499; Ibid. 441, Sec. 41; Towns. Lib. and Sl., Sec. 212, and note 1; also Sec. 355 and notes 1, 2 and 3 on p. 605; Sanford v. Gaddis, 13 Ill. 329; Darling v. Banks, 14 Ill. 46; 13 Am. and Eng. Ency. 397-8 and cases cited in note 3, p. 398.

The plea is taken most strongly against the pleader; everything must be precisely alleged. Towns. Lib. and Sl. 608, note 2. The rule as to framing a plea of justification is thus clearly stated by Chitty: "It is necessary that the plea should state specific facts (*sic*), showing in what particular instances, and in what exact manner the plaintiff has misconducted himself." 1 Chitty on Pl. 494.

The charges in the declaration must be directly met, and not argumentatively or by inference. Fidler v. Delavan, 20 Wend. 57, cited in 1 Hilliard on Torts, 441. The plea admits the truth of the innuendoes in the declaration. 1 Hill. Torts, 441; Towns. Lib. and Sland., Sec. 215; 13 Am. and Eng. Ency. 397.

And must justify in the sense of the innuendoes. Towns. L. and Sl., Sec. 212; Nott et ux. v. Stoddard, 38 Vt. 25; 88 Am. Dec. 633.

There is no such thing as a half-way justification. *Fero v. Ruscoe*, 4 N. Y. 165.

The justification should be of the meaning, not of the words merely. *Snow v. Witcher*, 9 Ired. 346.

The distinction maintained between oral and written language, as regards its actionable quality when published concerning an individual as such, is not recognized in regard to language concerning one in a special character. *Towns. Lib. and Sl.*, Sec. 180.

"To make an answer in justification good, it must specifically point out the acts of which the plaintiff was guilty, that the court may see whether the defendant was justified in speaking the words complained of." If the plea does not aver that the words are true, in the sense imputed to them in the declaration or complaint by proper innuendo, it is bad. 13 Am. and Eng. Ency. L., 398, and numerous cases in note 2; see also *Mull v. McKnight*, 67 Ind. 535; *Funk v. Beverly*, 112 Ind. 190; 13 N. E. Rep. 573.

GOVERT & PAPE and INGRAM & CREWDSON, attorneys for appellee.

"Criticism may be divided into criticism of persons and criticism of things. What one does, one's actions, are things, and as such have a separate existence, distinct from the person. Every action, every thing one does, is naturally and necessarily the subject of comment. Every action, every thing one does, confers a privilege upon every person to speak or write concerning such action or thing. As to such action or thing every one may in good faith speak or write whatever seems to him fit to be spoken or written. Save good faith there is no limit to criticism concerning a man's actions or his creations. God forbid (exclaims Baron Alderson) that you should not be allowed to comment on the conduct of all mankind, provided you do it justly and honorably." It is apparent that the words alleged to have been used by defendant are nothing more than a criticism of the action of plaintiff in using an anæsthetic. They are not criticisms of the person and consequently, under the above

rule, they fall under that class of criticisms which are permitted under the law and therefore are privileged. Newell on Slander and Libel, 564; Townshend on Slander and Libel, 441.

In an action of oral or written slander the plea of the general issue operates as a denial of the extrinsic facts stated in the inducement, the speaking of the words or publication of the libel, the truth of the colloquium or the application of the words to the plaintiff, and of the extrinsic fact alleged in the declaration, and the damage, where special damage is necessary to maintain the action, or more than nominal damages are claimed. Where the defense is that the libel or words were published or spoken, not in a malicious sense imputed by the declaration, but in an innocent sense, or upon an occasion which warranted the publication, this matter may be given in evidence under the general issue. Newell on Slander and Libel, 648.

The charge, if any, contained in the words alleged to have been slanderously spoken, is the charge of a specific act, and not a mere conclusion or inference. See Kuhn v. Young et al., 78 Tex. 344; 14 S. W. Rep. 796; Fenstermaker v. Tribune Pub. Co., 13 Utah, 532; 43 Pac. Rep. 112.

MR. JUSTICE BURROUGHS DELIVERED THE OPINION OF THE COURT.

The amended declaration in this case, filed March 22, 1897, avers that the plaintiff is a regularly licensed practitioner of dentistry under the laws of Illinois, practicing his profession at Adams county, Illinois, in connection with his brother, Merritt Rice, where they are known as and commonly called "The Rice Boys," "The Rice Brothers" and "The Rices." That he exercised and still exercises his profession with care, prudence, skill, learning, caution and safety, and never at any time used or employed any liquid or anæsthetic or material in such manner as to be injurious, hurtful or dangerous to any person or persons for whom he rendered professional dental services, and was never guilty or suspected to be guilty of committing the grievances

charged and imputed to him by the defendant, etc. Yet, the defendant, well knowing the premises, etc., contriving and falsely and maliciously intending to injure the plaintiff and to bring him into public scandal and disgrace, etc., and to cause to be suspected and believed by divers citizens of this State, etc., that the plaintiff had conducted himself improperly, imprudently, carelessly, negligently, recklessly, ignorantly and in such way and manner in his profession as to prejudice, hurt and endanger the health and lives of persons for whom he rendered professional services as such dentist, etc., and to harass, vex, oppress and ruin said plaintiff in his said practice, etc., on the first day of May, 1896, at said county, in a certain discourse which said defendant then and there had in the presence and hearing of divers persons, falsely and maliciously spoke and published of and concerning the plaintiff in the way of his said profession, etc., the following false, malicious and defamatory words, to wit: "They (meaning the plaintiff and his said brother) are going to kill somebody with that anæsthetic they (meaning the plaintiff and his said brother) are using." "It will cause blood poisoning." "The Rice boys (meaning the plaintiff and his said brother) are going to kill somebody some time with that anæsthetic they (meaning the plaintiff and his said brother) are using." "It will cause blood-poisoning." "The Rice boys (meaning the plaintiff and his said brother) will kill somebody some time if they don't quit using that anæsthetic," meaning and intending thereby to charge and cause it to be believed by said divers persons and the citizens of this State generally, that the plaintiff was and had been careless, reckless, grossly negligent and culpably ignorant and unskillful in the way of his work, practice and services as a practitioner of dentistry, as aforesaid. By means whereof, etc., the plaintiff has been greatly injured in his good name and fame and also in his said profession and business as a practitioner of dentistry, etc., to his damage of \$5,000. Defendant pleaded:

1. General issue, not guilty.
2. Statute of limitations.

General replication to each of said pleas:

The secondly amended third plea filed by the defendant, to which a demurrer was by the court below overruled and the sufficiency of which is the only question raised on this appeal, attempts to justify the slander, and alleges that the plaintiff used in his profession, upon persons for whom he did work, an anæsthetic, one of the ingredients of which was cocaine, then and there a dangerous anæsthetic which "was capable of and at times would produce death and blood-poisoning in persons upon whom the same would be used," etc., and "that the said words in the plaintiff's declaration alleged to have been spoken by the defendant," etc., setting them out *in hæc verba*, "were then and there at the time and place, etc., true." Wherefore defendant spoke the words as he lawfully might, etc.

The demurrer to this plea alleges "that the same and the matters therein contained in manner and form as they are therein pleaded, are not sufficient in law to bar plaintiff's action etc., and for special cause alleges that said plea does not answer or justify the charges in the declaration. Said plea attempts to justify a charge not made or found in the declaration. Said plea does not justify in the true sense of the charge. The justification in the plea is not as broad as the charge. The plea does not justify the charge in the sense of the innuendoes, and is otherwise informal, argumentative, uncertain and insufficient."

The plaintiff in the court below, appellant here, upon the court overruling his said demurrer to said plea of justification, elected to stand by his demurrer. Whereupon the court below gave final judgment against appellant for costs and that he go without day, etc. From this judgment appellant appeals to this court, and contends that the court below erred in not sustaining his demurrer to said plea of justification.

It will be seen by a careful reading of the amended declaration that it charges defendant with having spoken of and concerning the plaintiff in the practice of his profession as a dentist, "that he is going to kill somebody with that

anæsthetic he is using; it will cause blood-poisoning. That he is going to kill somebody some time with that anæsthetic he is using; it will cause blood-poisoning. That he will kill somebody some time if he don't quit using that anæsthetic." The plea of justification only states that the plaintiff used in his profession, upon persons for whom he did work, an anæsthetic, one of the ingredients of which was cocaine, a dangerous anæsthetic, which was capable of and at times would produce death and blood-poisoning in persons upon whom the same would be used, etc. And that the said words in the plaintiff's declaration alleged to have been spoken by the defendant were then and there true, etc.

It will be seen at a glance that the plea of justification is not as broad as the charge in the declaration, and for that reason was bad on demurrer. *Sanford v. Gaddis*, 13 Ill. 329; *Darling v. Banks*, 14 Ill. 46. *Chitty* thus states the rule as to framing a plea of justification: "It is necessary that the plea should state specific facts, showing in what particular instances, and in what exact manner, the plaintiff has mis-conducted himself." *Chitty on Pl.*, marg. p. 494.

Appellee insists, in his brief, that the demurrer to his plea of justification should have been carried back to the declaration, as that was bad on demurrer. We are of the opinion that the trial court would not have been justified in carrying the demurrer back to the declaration, as the declaration is sufficient to be answered; and it seems appellee so thought, because he filed a plea of general issue thereto, and also a plea of the statute of limitations, neither of which pleas he withdrew, and then requested the trial court to carry the demurrer back to the declaration.

For the error of the trial court in not sustaining the demurrer to the plea of justification, we reverse the judgment herein, and remand this case to the court below, with instructions to that court to sustain the demurrer to said plea, and for such further proceedings herein as the law permits.

Reversed and remanded with instructions.

John M. Kuhl v. Z. T. Mowell.

1. **DISTRESS FOR RENT—*Not Yet Due.***—A distress warrant stands for the landlord's declaration in a proceeding by distress for rent and no distraint for rent not due by its terms, can be made.

Distress for Rent.—Appeal from the County Court of Moultrie County; the Hon. ISAAC HUDSON, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed December 2, 1897.

R. M. PEADRO, attorney for appellant.

COCHRAN & MILLER, attorneys for appellee.

MR. JUSTICE BURROUGHS DELIVERED THE OPINION OF THE COURT.

The latter part of 1895, appellee, then a tenant of appellant and indebted to him on settlement to the amount of \$338, gave him his note for that amount, due one year after date, which note was also signed by appellee's son, Lue Mowell. At the time said note was given, appellee rented of appellant for the next year, beginning March 1, 1896, the same farm he then lived upon, and by agreement between them, appellant was to get two-thirds of the broom corn raised upon the farm the next year, when in the bale; one-third of said crop of broom corn being given for the use of the farm for the year 1896, and the other one-third for the purpose of securing the payment of the said \$338 note. The dwelling house, barn and lot on said farm, at this time, were reserved by appellant and not rented to appellee, but some three months later appellant did lease to appellee said dwelling house, barn and lot for \$50, but the time when it was to be paid was not agreed upon, hence it was not due until March 1, 1896, being the end of the term for which they were leased.

On October 5, 1896, appellant issued to the sheriff of Moultrie county his distress warrant against appellee for \$800 rent, claimed to be due him on October 3, 1896, from

appellee for said premises. The sheriff by virtue of said distress warrant levied upon a lot of broom corn, both baled and loose in the barn on said premises, there being about 121 bales in the bale, and about forty or forty-five bales loose.

On the trial appellee denied that any rent was due appellant, as stated in his distress warrant, and we think from the evidence, he was partially if not wholly correct; the house rent was not due, the amount of the note was not yet due, nor was it rent, when due, for which distress would lie. The broom corn rent, being one-third thereof grown upon the demised land during the term, was due when baled, and that part of the rent in the absence of any other express contract (and there was none shown), was due in bales on the demised premises, and it was found by the sheriff, at the barn on the demised premises, ready for appellant, when he should call for it there.

It must be remembered that this distress warrant stands for the landlord's declaration in this distress proceeding, and in it no claim was made that the rights of the landlord were in danger by reason of the removal or the contemplated removal of crops grown upon the demised premises, and for that cause he was distraining for rent not yet by its terms due, but the only claim made therein was for rent due October 3, 1896.

Hence we think the verdict and judgment of the court below was on the pleadings and evidence correct. And we therefore affirm the judgment herein of the County Court of Moultrie County.

72	482
74	548
72	462
179	340

Supreme Lodge Knights of Pythias of the World v. Henry J. Kutscher, Adm'r.

1. **FORFEITURES**—*Not Favored in Law.*—Forfeitures are not favored in law and will not be enforced except where the acts relied upon as creating them are clearly shown.

2. **SUICIDE**—*Forfeiture of Insurance.*—Where a policy of life insurance contains no provision making suicide or self-destruction by the

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assured, a forfeiture of the policy, and makes the indemnity under it payable to some one other than the assured or his personal representative, then intentional self-destruction, while he is sane, does not avoid the policy; but where such a policy is by its terms payable to the assured or his personal representative, then intentional self-destruction while sane will avoid the policy.

3. *LIFE INSURANCE—Suicide of the Assured While Sane.*—The estate of an assured person, who takes his life intentionally while sane, can not recover under a policy containing a provision making suicide or self-destruction by the assured a forfeiture.

4. *BENEVOLENT ASSOCIATIONS—Members Bound by Subsequently Enacted By-Laws.*—Where an application for membership in the endowment rank of a benevolent association contains a provision that the applicant shall conform to and obey the regulations of the order governing the rank, then in force or that might thereafter be enacted, and the certificate of membership recites that the consideration on which it was issued is, among other things, the compliance by the member with all such regulations, the right of the member to benefits is subject to a validly enacted law of the order, passed after the issuance of the certificate, providing that no member who commits suicide shall be entitled to benefits.

5. *SAME—Effect of Anti-Suicide Provisions Adopted after Application.*—A provision in the constitution of a benevolent association having a life insurance department that its board of control shall have entire charge and full control of the endowment rank, subject to such restrictions as the supreme lodge may provide, does not authorize the board of control to pass a regulation providing that no beneficiary who commits suicide shall be entitled to benefits.

6. *SAME—Powers Can Not be Delegated.*—The charter of a benevolent association authorizing its supreme lodge to establish an endowment rank on such terms and conditions as to the supreme lodge may seem proper, does not authorize such lodge to delegate to the board of control power to pass a law providing that no member who commits suicide shall be entitled to benefits.

Assumpsit, on a certificate of membership in a beneficiary association. Appeal from the Circuit Court of Sangamon County; the Hon. ROBERT B. SHIRLEY, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed December 2, 1897.

H. H. FIELD and GREENE & HUMPHREY, attorneys for appellant.

CONNOLLY, MATHER & SNIGG, attorneys for appellee.

If a person takes out a policy and then deliberately suicides while sane, his estate, or his personal representa-

tives who represent his estate, perhaps may not recover. But third persons or beneficiaries may recover. *Fitch v. American P. L. Ins. Co.*, 59 N. Y. 557; *Mills et al. v. Bobstock et al.*, 13 N. W. Rep. 163; *Northwestern, etc., v. Wanner*, 24 Ill. App. 357; *Kerr v. Minnesota Mutual Ben. Ass'n*, 39 N. W. Rep. 312; *Darrow v. Family Fund Soc.*, 22 N. E. Rep. 1093; *Ritter v. Mutual L. Ins. Co.*, 70 Fed. Rep. 957.

MR. JUSTICE BURROUGHS DELIVERED THE OPINION OF THE COURT.

This is an action of assumpsit, brought by the appellee, Kutscher, as administrator of Louisa M. Henry, deceased, upon a certificate of membership, or policy of insurance, issued by appellant to one William C. Henry, who was the husband of Louisa M. Henry. For the sake of brevity, we will hereafter speak of said certificate as a "policy."

The policy is in words and figures following: "Fourth class, \$3,000. This certifies that Brother William C. Henry received the obligation of the Endowment Rank of the Order of Knights of Pythias of the World, in Section No. 45, on July 1, 1889, and is a member in good standing in said rank; and in consideration of the representations and declarations made in his applications bearing date of June 4, 1889, and April 26, 1892, which applications are made a part of this contract, and the payment of the prescribed admission fee; and in consideration of the payment hereafter to said endowment rank of all assessments, as required, and the full compliance with all the laws governing this rank now in force, or that may hereafter be enacted by the Supreme Lodge Knights of Pythias of the World, or the Board of Control of the Endowment Rank, and shall be in good standing under said laws, the sum of \$3,000 will be paid by the Board of Control of the Endowment Rank Knights of Pythias of the World to Louisa M. Henry, his wife, as directed by said brother in his application, or to such other person or persons as he may subsequently direct, by change of beneficiary entered upon the records of the Supreme Secretary of the Endowment Rank, upon due notice and

proof of death and good standing in the rank, at the time of death, and surrender of this certificate. *Provided*, however, that the interest of any beneficiary, as designated by said brother, or the interest of his or her heirs shall cease or determine in the case of the death of said beneficiary during the lifetime of such member, and in that case the benefit accruing under this certificate shall be paid as provided for in article 12, section 1, of the Endowment Rank of the constitution. *Provided, further*, that if at the time of the death of said brother the proceeds of one assessment on all members of the endowment rank shall not be sufficient to pay in full the maximum amount of endowment held under this certificate, then there shall be paid an amount equal to the proceeds of one full assessment on all remaining members of the Endowment Rank, less ten per cent for expenses, and the payment of such sum to the beneficiary or beneficiaries entitled thereto under the law shall be in full of all claims and demands under and by virtue of this certificate. And it is understood and agreed that any violation of the within mentioned conditions or the requirements of the laws in force governing this rank, shall render this certificate and all claims null and void; and that the said Endowment Rank shall not be liable for the above sum or any part thereof.

In witness whereof we have hereunto subscribed our names and affixed the seal of the Supreme Lodge Knights of Pythias of the World.

Issued this 19th day of July, 1892, p. 29, at Chicago, Illinois, and registered in book 3, folio 130."

On the 3d day of October, 1895, William C. Henry departed this life, having paid all assessments and performed all other conditions of said policy, and left surviving him his wife, Louisa M. Henry, who died before suit was brought, leaving surviving her two children. Demand was made for payment of the sum specified in said policy, and an offer also made to surrender the same, but payment was refused. There being no controversy as to the sufficiency of the declaration, it is not necessary to set it forth with any degree

of particularity. Various pleas, replications, rejoinders and demurrers were filed, some of which were afterward withdrawn. These steps need not be herein stated except as to those pleadings which finally made up the issues.

The appellant filed the general issue (non-assumpsit) and issue was joined thereon. The appellant also filed two special pleas setting up that all the supposed causes of action in the declaration described are one and the same; that the appellant is a corporation organized for fraternal and benevolent purposes, and for the mutual benefit of the members. The first plea also alleges that said William C. Henry was a member of Capital Lodge No. 14, and also a member of Section 45, and was subject to the constitution and rules, by-laws and regulations of the Endowment Rank Knights of Pythias of the World, and agreed to abide by all laws, rules and regulations of said order then in force, or as the same might be thereafter adopted or amended.

The plea also alleges that on the 4th day of June, 1889, and on the 26th day of April, 1892, said Henry executed and presented to defendant his applications for membership in the Endowment Rank, which applications became part of the contract of insurance, and such applications are made parts of said plea. That by the terms of said applications it was provided as follows:

"I hereby agree that I will punctually pay all dues and assessments for which I may become liable, and that I will be governed and this contract shall be controlled by the laws, rules and regulations of the order governing this rank now in force, or that may hereafter be enacted by the Supreme Lodge Knights of Pythias of the World, or submit to the penalties therein contained, to all of which I freely and willingly subscribe."

The plea further avers that on the 13th day of January, 1893, the Supreme Lodge through its authorized board of control passed a law, rule and regulation for the government of members of the Endowment Rank in the words and figures following:

"If the death of any member of the Endowment Rank,

heretofore admitted into the first, second, third or fourth classes, or hereafter admitted, shall result from self-destruction, either voluntary or involuntary, whether such member shall be sane or insane at the time, or if such death shall be caused or superinduced by the use of intoxicating liquors, narcotics or opiates, or in consequence of a duel, or at the hands of justice, or in violation or attempted violation of any criminal law, then, in such case, the certificate issued to such member, and all claims against said Endowment Rank, on account of such membership, shall be forfeited."

The plea further alleges that at its annual session in the city of Washington, in September, 1894, the Supreme Lodge adopted and ratified said law, and the same became and was in force from and after its passage, on January 13, 1893, as an amendment to the general laws of the Endowment Rank.

The plea further alleges that said William C. Henry came to his death by self-destruction, and that in accordance with the contract entered into, said certificate became forfeited and void.

The defendant also filed a third plea, being the second special plea, in substance the same as the first with this exception: That the third plea alleges that said law, rule and regulation was adopted on the 13th day of January, 1893, by the board of control of the Endowment Rank without stating that the same was ratified or adopted by the Supreme Lodge.

Appellee filed replications as follows:

First replication to the third plea avers that the board of control had no power to pass the said law or regulation, and did not pass the same on the 13th day of January, 1893, or at any other time, and said certificate did not become void. This replication concluded to the country and issue was joined thereon.

Appellee's replication to the second plea is the same in substance as the foregoing with this difference only, that it denied that the Supreme Lodge adopted or ratified the rule or law in question. This replication also concluded to the country and issue was joined thereon.

Appellee also filed another or second replication to defendant's second plea, in which it was averred that at the time when William C. Henry committed self-destruction "he was of unsound mind, to the extent that he was not conscious of the moral or physical effects of what he was doing, and that he did the same when in a fit of frenzied madness, when he had no ability to form an intention, and did not voluntarily and intentionally destroy himself." To this replication a rejoinder was filed by the appellant traversing the same, and alleging that William C. Henry did not commit said act while in a fit of frenzied madness, but did commit self-destruction voluntarily and intentionally. Issue was taken upon said rejoinder and trial had by jury.

Verdict for plaintiff for \$3,000.

Motion for new trial.

Grounds of motion: The court erred in excluding evidence from the jury, that the deceased, Henry, committed self-destruction as the result of mental disorder arising from present voluntary intoxication. Also excluding certified copies of proceedings and verdicts of coroner's inquest over the body of Henry and his wife; the court erred in instructing to find the issue for appellee; also in refusing to give each of the four instructions offered by the appellant; the verdict was unsupported by any evidence; the court erred in admitting improper evidence on the part of appellee; the court erred in excluding from the jury each instruction, record or proceeding, rule or regulation embraced within the stipulation of the parties, the substance of which is contained in the next paragraph.

Before the trial counsel for the parties stipulated in writing that on the trial certain instruments, records, printed volumes and other documents should be admitted in evidence by either party. These included constitutions of the Knights of Pythias and of the Endowment Rank and proceedings of both bodies at various times; also the general laws of the Endowment Rank; also the application of William C. Henry filed with appellee's second plea should be considered in evidence without further proof. It was, how-

ever, provided in said stipulation that the terms thereof were not to conclude either party as to the legal effect or legality of any of such evidence, but only render it easy of proof and evidence of what it purports to be on its face, by leaving its legal effect to be determined by the court at the trial. There is no controversy whatever in this case as to the regularity of proof under said stipulation, only as to the effect of the evidence when admitted.

Appellee proved the death of William C. Henry, and his wife, Louisa, afterward, and that she left surviving her two children. Appellee also proved that William C. Henry paid up all his dues to the order, or they were paid on his behalf up to the time of his death. The daughter of the deceased parties testified that her father came home on the evening before her mother died, about a quarter to five. Her mother was out riding when her father came home. On cross-examination, defendant's counsel asked witness "What happened after that?" Plaintiff objected, and the court sustained the objection. We may here state in order to save time that all rulings of the court hereinbefore or hereinafter referred to were, at the time the same were rendered, excepted to by appellant.

It was proven by E. A. Baxter, sheriff of Sangamon county, that he, being informed that Mrs. Henry was shot, went, about seven the next morning, to where William C. Henry's body was lying. Witness was called just after Henry shot his wife. Henry was dead. Right hand raised up. Revolver lying close by there and an open knife. Cut across the wrist.

In the testimony of Martha Horsch, it is shown that the deceased, Henry, was ordinarily a very intelligent man, and a good locomotive engineer, but something became wrong with him. Witness saw him one or two evenings before he died. He was under the influence of liquor. Mrs. Henry sent for witness. He was going to clean out the house. Witness found him on the floor and picked him up and put him to bed.

Charles Shriver testified also about occasional strange-

ness on the part of William C. Henry. Testimony in regard to the mental condition of Henry was given by George Hoffman, who was also employed by the Wabash Railroad. This man was very intimate with the deceased. Knew him thoroughly. His strangeness arose from intoxication. When under the influence of liquor he was very quick tempered—quarrelsome disposition—although he talked very good. He would talk and quarrel and witness knew when he was under the influence. Next day he would not remember anything and begged pardon. He was different from other drunk men. He would not walk heavy or stagger. He was not that way. Would walk straight and had a quarrelsome disposition about him. Liquor affected him differently from ordinary men. Had been discharged for drunkenness. Wanted to stop every place where a station was, to get liquor. Wanted to fight every man on the train. This was several years before the company took him back. He knew how liquor affected him and talked about it. Three or four months afterward he was again drinking. Witness saw him in grocery three or four days before the killing. There was a saloon there. He was under the influence then. Could only know when these spells were on him by his quarrelsome disposition. He did not get off his legs or lose control of his body. Talked clearly but acted quarrelsome. Saw him in Elshoff's store three to five days before murder. Smell of liquor convinced witness he was drunk and said to him, "Bill, you have been drinking again." This made him mad and he lost control of his temper. Witness glided away. Next day he apologized.

J. W. Asey testified that he saw the body between six and seven on the 4th of October, 1895, probably dead some hours. Body stiff. Witness saw the man the night before, just this side of where he found him. Probably fifty yards off. Passed very close to shock of corn. Looked up and discovered body. Witness had seen the man go behind the shock the night before, and in the morning he looked to see if the body was there. Right hand kind of up, resting his

head partly on it. Pistol lying on the ground under where the hand stuck up. Saw a knife there. Think it was under his head. It was open. Wound in the temple like a pistol wound. Saw him go behind the shock the evening before, about half past six.

Defendant introduced, under stipulation, report of the Board of Control of the Knights of Pythias, found in the record and proceedings of convention of Supreme Lodge 1893 and 1894, the session of 1894 having been held in Washington City, August 28 to September 8, 1894. The report of the board of control set forth reasons why losses arising to the order from suicide should be guarded against. Gives reasons and sets forth that in the preceding fifteen months, claims amounting to \$63,000, arising out of suicides, had occurred, and the safety of the mortuary fund was thereby in danger. Also that the board had amended the laws providing that in the event of self-destruction the certificate should be void. To that end the said board on January 12 and 13, of 1893, had amended section one, article six, of the general laws, by adding to the end of said section as follows: "The new law, rule or regulation thus here set forth has been already given in full in the pleas of the defendant and need not be repeated."

It was referred by the Supreme Lodge to committee on endowment rank. The reports of the committee on endowment rank were taken from the table and adopted. The appellee also introduced the law as adopted by the board of control in the revised edition of the general laws, March 1 to 18, 1894, being the same law hereinbefore referred to. The law last referred to being offered by the appellant, the appellee objected, and the court sustained the objection, so that the law in question was withheld from the jury.

Appellant introduced section nine, article eight, of the Constitution of 1890 of the Endowment Rank, authorizing the board of control to enact laws, rules and regulations and to alter and amend the same. Also section five, article two, of the same constitution; it empowers the board of

control to enact, alter and amend laws and regulations necessary to govern the same. Also the Constitution of the Supreme Lodge of 1890, 1892 and 1894, and the Constitution of the Endowment Rank. Constitution provides that the supreme body shall have power to establish an endowment rank and to create a board of control for the government thereof; that said board shall have entire control of said endowment rank. Board empowered to grant warrants to establish sections of endowment rank and to enact, alter and amend all laws and regulations necessary.

Constitution of 1894. This constitution appears in the larger pamphlet and is made part of the record, the first page thereof being numbered at the foot 6955.

In article seven, sections fifteen, sixteen, seventeen and eighteen on head page 6961, special directions are given as to the methods of legislation to be pursued by the order. Every proposition should be read three times on a different day; the majority of all members necessary to pass any proposition; all statutes to take effect after sixty days.

Appellee offered in evidence the two applications filed with plaintiff's pleas, one of them being the application on which policy sued on was issued. Appellant objected and court withheld ruling. Appellant called Louisa, daughter of William C. Henry, who formerly testified. Witness stated that she was at home on the evening of October 3, to which she had before testified. And then the following question was put to her: "If your father came home at that time, or about that time, you may tell the jury what happened there in your presence." Appellee objected and the court sustained the objection and refused to permit the evidence to go to the jury. Appellant then offered in evidence the verdict of the coroner's jury in the cases of both the deceased, the wife, Louisa M. Henry, and her husband, William C. Henry. Verdicts in substance are as follows: As to the wife, that she came to her death by a revolver wound fired by her husband, William C. Henry, while under the influence of liquor. As to her husband, that he came to his death by a revolver shot. Both verdicts were

objected to by appellee. Objections sustained by the court. Appellant rested.

By way of rebuttal appellee introduced charter of Supreme Lodge of August 5, 1890, as follows: "That the following additional section, to be known as section nine, be added to the act of incorporation as amended, viz.: 'That the Supreme Lodge shall have power to establish the Uniform Rank and the Endowment Rank upon such terms and conditions and governed by such orders and regulations as to the said Supreme Lodge may seem proper.'"

Appellee also introduced the report from the committee on endowment rank of the nineteenth convention, 1896, reporting that, under the constitution of 1894, the Supreme Lodge had no power to delegate to another body the right to legislate on any subject, and that such action, if taken, is null and void, and recommending the enactment by the supreme body of the suicide law in question.

Thereupon the court, on motion of the appellee, excluded all evidence offered by the appellant of the acts and proceedings of the board of control of the Endowment Rank and the Supreme Lodge, and the Constitution of 1890, 1892 and 1894; and the court also excluded the application offered in evidence.

The appellant asked the court to give the jury the following instructions:

1. The plaintiff in this case admits that the deceased, William C. Henry, committed self-destruction, and the defendant is not required to prove this fact.

2. If the jury believe from the evidence that the deceased committed self-destruction by reason of mental derangement occasioned by existing voluntary intoxication, then such act is not excusable because of insanity, and the plaintiff can not recover in this action.

3. The jury are further instructed that the law presumes every man to be sane until the contrary be proven, and the burden of making such proof rests upon the party alleging such insanity. And the fact of committing self-destruction does not of itself establish the insanity of such person.

4. The jury are instructed that if they believe from the evidence that the deceased, William C. Henry, committed self-destruction while in a sane condition, then they will find for the defendant, without regard to any rule or law adopted by the board of control, or by the Supreme Lodge, or claimed to be so adopted.

But the court refused to give said instructions, and thereupon the court gave the jury the following instruction:

"The court instructs the jury to find the issues for the plaintiff and to assess his damages at the sum of \$3,000, and the form of your verdict may be: "We, the jury, find the issues for the plaintiff and assess his damages at the sum of \$3,000.'"

Thereupon the jury found a verdict for the appellee, and the appellant filed its motion for a new trial. Motion overruled and judgment on verdict for \$3,000.

From the exceptions taken, and the errors assigned on this record, the legal questions presented, upon which the merits of this case rest, are: First, if William C. Henry committed self-destruction while sane, did that fact avoid the policy? Second, did the stipulation set forth on the face of the policy authorize the "Board of Control of the Endowment Rank" of appellant, to adopt the rule, law or regulation providing that all policies should be void in case the assured committed self-destruction, whether sane or insane, so as to make it apply to the policy sued on in this case?

As to the first question above stated, we think the law is, that where a policy contains no provision making suicide or self-destruction by the assured a forfeiture of the policy, and makes the indemnity under it payable to some one other than the assured, or his personal representative, then intentional self-destruction by the assured, while he is sane, does not avoid the policy. But, where such a policy is by its terms payable to the assured, or his personal representative, then intentional self-destruction, while sane, will avoid the policy. *Northwestern Benevolent and Mutual Aid Ass'n v. Wanner*, 24 Ill. App. 357.

The reason why the estate of a sane man, who takes his own life intentionally, can not recover is, that to so permit would enable a man by his own wrongful act to have his estate make a profit thereby.

As to the second question presented we will say, that from the evidence in this record it does not appear that the Supreme Lodge did, before the death of William C. Henry, adopt the law, rule or regulation for the government of members of the Endowment Rank in the words and figures following: "If the death of any member of the Endowment Rank heretofore admitted to the first, second, third or fourth classes, or hereafter admitted, shall result from self-destruction, either voluntary or involuntary, whether such member shall be sane or insane at the time, or if such death shall be caused or superinduced by the use of intoxicating liquors, narcotics or opiates, or in consequence of a duel, or at the hands of justice, or in violation or attempted violation of any criminal law, then in such case the certificate issued to such member and all claims against said Endowment Rank, on account of such membership, shall be forfeited." As by its plea it has averred.

But it does appear from the evidence that the board of control of the Endowment Rank of appellee (which board of control, from the evidence, was the board that supervised the business of the insurance department of appellant), before the death of William C. Henry, and after the issuance of the policy sued on in this case to him, did what they could do to enact said law, rule or regulation above mentioned; but we hold that said board of control was but an agency of appellant, to whom appellant could not delegate its legislative functions to enact a law that would inject into the policy sued on, a provision making suicide, etc., avoid it. See Supreme Lodge Knights of Pythias v. La Malta, 95 Tenn. 157, 31 S. W. Rep. 493, decided by the Supreme Court of Tennessee, which is a case just like this, and we fully concur in the decision, as well as the reasoning of that court, as set forth in its opinion in that case.

It is contended, however, by appellant, that the policy sued on reserved the power of legislation to the board of control as well as the Supreme Lodge, and action by either of those bodies, was ample under the express consent of the deceased.

But we think the language used in the policy sued on, to wit, "The full compliance by the assured with all the laws governing this rank, now in force, or that may hereafter be enacted by the Supreme Lodge of the Knights of Pythias of the World, or the board of control of the Endowment Rank," could not be construed to confer legislative function upon the board of control, the mere agency of appellant, to the extent of changing the contract of insurance sued on, and injecting conditions therein by which the same might become void—the legislative function restricted by the constitution of appellant to appellant itself; it being a well understood rule of law that forfeitures are not favored in law, and will not be enforced, except where the acts which would make a forfeiture are clearly shown.

Inasmuch, therefore, as the record in this case discloses that the trial court held correctly in its rulings on the evidence, instructions to the jury and its judgment, we affirm its judgment herein. Affirmed.

Daniel McLaughlin v. The First National Bank of Pana, Illinois.

1. JUDGMENTS—*Wrongful Refusal to Satisfy of Record*.—It is actionable for a judgment creditor, after he has been paid his judgment in full, to refuse or neglect to satisfy of record such judgment within a reasonable time after he has been paid, and by his debtor requested so to do.

Trespass on the Case, for refusing to satisfy a judgment of record. Appeal from the Circuit Court of Christian County; the Hon. ROBERT B. SHIRLEY, Judge, presiding. Heard in this court at the May term, 1897. Reversed and remanded with instructions. Opinion filed December 2, 1897.

JAMES B. RICKS and J. C. McQUIGG, attorneys for appellant.

A tort is one's disturbance of another in rights which the law has created, either in the absence of contract or in consequence of a relation which a contract has established between the parties. Of course, a wrong must be of a sort which the law redresses; not a mere infraction of good morals. Bishop on Non-Contract Law, Sec. 4.

A right can not be recognized until the principle is found which supports it, but when the right is found the remedy must follow, of course. A maxim of law that wherever there is a right there is a remedy, is a mere truism. Cooley on Torts, 2d Ed., 20.

A judgment is, in law, presumed to be an existing debt for the period of twenty years, unless satisfied of record.

A judgment of a court of record being a lien upon real estate for seven years, with the right in the holder to issue an execution thereon, even after a longer time, it is the duty of the holder to satisfy the same upon payment. And if he fails to do so, a court of equity and a court of law as well, has power to compel him to enter satisfaction and tax him with the costs thereof. Black on Judgments, Sec. 1014; Briggs v. Thompson, 20 Johns. 294; 12th Am. and Eng. Enc., 150.

W. M. PROVIN and J. C. McBRINE, attorneys for appellee.

The losses and damages alleged by appellant to have been suffered by him are remote and not the proximate consequences of the act of appellee complained of. "The damage to be recovered must always be the natural and proximate consequence of the act complained of. This rule is laid down in regard to special damage, but it applies to all damage." Greenleaf on Evidence, Vol. 2, Sec. 256 (Tenth Ed.); Parson on Contracts, Vol. 3, pp. 178, 179, 180 (Fifth Ed.); Sutherland on Damages, Vol. 1, pp. 76, 77, 78, 79; Sedgwick on Damages (Seventh Ed.), 122, *et seq.*, and 126, note a; Travis v. Duffau, 20 Texas, 49.

Profits which appellant might have made in his business,

when even the loss of them might have been the natural consequence of appellee's omission, are not to be allowed for the reason that they are speculative, conjectural and contingent. Appellant is only able to show that he might have made the profits if appellee had not committed the wrong. If the profits are such as would have accrued and grown out of the contract itself as the direct and immediate result of its fulfillment, then they should be allowed; but if they are such as would have been realized by appellant from other independent and collateral undertakings, then they are too uncertain and remote to be taken into consideration as part of the damages occasioned by the act or omission of appellee. Sedgwick on Dam., Vol. 1, 135, note. (7th Ed.)

Damages caused by loss of future profits, resulting from the wrongful levy and seizure of a stock of merchandise, are too remote and uncertain to be allowed. Casper v. Klippen, 61 Minn. 353; 63 N. W. Rep. 737.

In an action upon an attachment bond, the rule restricting the recovery to the natural and approximate damages will exclude any claim of damages for injuries to credit and business. Sutherland on Dam., Vol. 1, 98; State v. Thomas, 19 Mo. 613.

The rules laid down have been sustained in our own Supreme Court in the following cases: Green v. Williams, 45 Ill. 206; Frazer et al. v. Smith et al., 60 Ill. 145; Chicago, B. & Q. R. R. Co. v. Hale, 83 Ill. 360.

MR. JUSTICE BURROUGHS DELIVERED THE OPINION OF THE COURT.

Appellant brought an action on the case in the Circuit Court of Christian County, against appellee, and in his declaration filed therein, consisting of four counts, the material averments were: That he was a merchant and a member of the firm of D. M. McLaughlin & Hombeck Bros., doing business in Cowden, Shelby county, Illinois, as dealers in general merchandise; and that he also conducted a mercantile business at Lakewood, in said county, and was a

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partner, as dealer in hay and grain at said Lakewood, of Herrick & Dressler in said county; and was sole owner of a mercantile business in general merchandise at Flora, in Clay county, Illinois; and a dealer in grain in said Clay county and adjoining counties, conducting his said business with punctuality in paying his debts, and enjoying the credit and esteem of his neighbors, the banks, wholesale merchants and all persons with whom he had dealings; that all of said businesses were conducted largely upon his credit, and that he derived large gains and emoluments therefrom; that he possessed valuable real estate in said counties of Clay and Shelby; that prior to February 16, 1894, said firm of D. M. McLaughlin & Hombeck Bros. became indebted to appellee in the sum of \$4,000, for which said firm gave it a judgment note, which appellee on said last named date, reduced to a judgment by confession, and caused execution to issue thereon at once; also caused a transcript of said judgment to be filed February 19, 1894, in the office of the clerk of the Circuit Court of said Clay county, where appellant resided; that on February 17, 1894, appellant paid to appellee said judgment and costs; and thereupon it was the duty of appellee to satisfy and release said judgment of record in both of said counties, which he promised appellant he would do. Yet the appellee, knowing the premises, but contriving and wrongfully intending to injure and destroy the good name, credit and business of appellant, and cause him to be regarded as a person of no credit, worth or substance, and although appellant often requested appellee so to do, he (appellee) did not, nor would release and satisfy said judgment of record, but permitted and suffered the same to stand unsatisfied of record until October 31, 1895, by means whereof appellant was injured in his credit, trade and business; and that one Lewis Parsons, who before then had undertaken to loan appellant \$5,000 for three years, and had advanced him \$3,000 thereof on the representation of appellant that said judgment was satisfied, the remaining \$2,000 to be furnished upon appellant's procuring an abstract showing the satisfaction thereof, upon finding that said record was not satisfied, demanded the

repayment of said \$3,000, and refused to loan appellant the other \$2,000 as agreed; that large orders of goods were, in consequence of said judgment standing unsatisfied of record, refused to be shipped to appellant by wholesale houses, and he was deprived of the benefit thereof; and particularly the firm of P. F. Aelzer, Sutton & Co., of Chicago, with whom appellant had largely dealt before and had enjoyed large credit, received appellant's order for goods, and in consequence of said judgment standing unsatisfied of record, refused to ship same, etc.; and that in consequence of the injury to the appellant's credit by the neglect and refusal of appellee to enter said judgment satisfied of record for said time, the credit and business of appellant were wholly ruined and he was obliged to surrender his business to his creditors; and that he was otherwise injured to his damage of \$20,000, etc.

To this declaration and each count thereof, appellee interposed in the court below a general demurrer, and assigned the following special reasons why it should be sustained, viz.: "That the damages alleged to have accrued in the first, second and third counts of said declaration, to wit, that he had, by reason of the allegations in said declaration, been greatly injured in his business, credit, reputation, and subject to suspicion and distrust by the wholesale merchants, dealers and mercantile agencies of the country and the business public in general, and his business had been wholly destroyed; and the allegations as to damages in the fourth count of said declaration * * * as therein contained, are not damages that would legitimately accrue to plaintiff (appellant) by reason of the acts complained of." The trial court sustained said demurrer, and gave judgment against appellant in bar of this action and for costs. Appellant excepted to the action of the court in sustaining said demurrer to said declaration, and stood by his declaration; and he brings this case to this court by appeal, assigning as error the action of the court below in sustaining said demurrer and rendering said judgment.

Appellee, in its brief, contends that said declaration is bad as against its demurrer because, it says, "the act of omission

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complained of is the failure of appellee to satisfy of record a certain judgment it had against appellant, * * * and as a result of such omission appellant's credit has been destroyed, * * * and he has suffered great business losses, etc. These are not the natural, probable or legitimate consequences that would ordinarily flow or would be likely to follow from the act or omission complained of."

We think, however, that the declaration discloses a good cause of action, and that the court below erred when it sustained the demurrer of appellee thereto.

It is actionable for a judgment creditor of a tradesman, after he had been paid his judgment in full, to refuse or neglect to satisfy of record said judgment within a reasonable time after he has been paid, and by his said debtor requested so to do; because the natural and probable effect of such refusal or neglect is to injure such tradesman in his credit and business; and for such injury such tradesman may recover such damages as a jury would find to be a reasonable compensation for the injury to his credit and business caused by such failure or refusal. The character of such tort, and the measure of damages therefor, are well stated by our Supreme Court in the case of *Schaffner et al. v. Ehrman et al.*, 139 Ill. 109.

We therefore reverse the judgment of the Circuit Court of Christian County herein, and remand this case to that court, with instructions to that court to overrule the demurrer of appellee to appellant's declaration, and for such further proceedings herein as the law permits.

Reversed and remanded with instructions.

City of Springfield v. Mary Brooks.

1. *ERROR—Will not Always Reverse.*—An error in giving or refusing an instruction which has resulted in no injury to the party complaining is not sufficient to reverse the judgment.

Trespass on the Case, for personal injuries. Appeal from the Circuit

Court of Sangamon County; the Hon. ROBERT B. SHIRLEY, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed December 2, 1897.

WILLIAM E. SHUTT, JR., city attorney, E. L. CHAPIN and JOHN C. SNIGG, attorneys for appellant.

GRAHAM & MILLER, attorneys for appellee.

MR. JUSTICE BURROUGHS DELIVERED THE OPINION OF THE COURT.

Appellee sued appellant in the court below, in this case, to recover damages for injuries received by her while walking leisurely along on a sidewalk on Pasfield street, in the city of Springfield, about 8 o'clock in the morning, on September 8, 1896, she falling by reason of her foot being caught in a hole in said walk, partly hidden by weeds growing thereon. Her fall produced injuries which caused great pain and inability to walk without crutches. In the court below appellee obtained judgment for \$1,800, from which appellant appealed to this court, assigning the following errors:

- "1. The court erred in overruling motion for new trial.
2. The court erred in giving the instructions asked by the plaintiff.
3. The court erred in rendering judgment for the plaintiff and against the defendant."

In its brief filed herein, appellant insists that the evidence fails to show that appellee was using ordinary care when she received the injuries complained of.

Upon examination of the evidence in this record, we find that no witness who testified saw appellee when she received the injuries complained of, and her own evidence was all there was on this point. She, in her evidence, in response to the question, "At the time it (the fall) occurred, what were you doing?" answered, "I was walking along leisurely; had nothing in my hand; was thinking about getting home as soon as I could conveniently. I never fell before in my life, and have been on the streets a good deal

on business." Further on in her evidence she said, "There were a good many weeds there; I noticed that as I stepped up there" (meaning on the walk). This was evidence tending to show ordinary care, we think, and in the absence of any contradictory evidence on this point, sufficient to sustain a verdict that she was using ordinary care. The other contention of appellant in its brief is that the court below erred in giving to the jury, at the request of appellee, instructions Nos. 1 and 4. Instruction 1 is as follows:

"The court instructs the jury that it is the duty of the city to use reasonable diligence to keep its sidewalks in reasonably safe condition and repair for foot passengers in passing to and fro over the same in the exercise of reasonable care for their own safety."

Instruction 4 is as follows:

"The court instructs you that if you believe from a preponderance of the evidence in this case that the plaintiff was walking along Pasfield street, in the city of Springfield, in the exercise of reasonable care and caution for her own safety, and while so doing her foot slipped, or in some way, without fault on her part, got into a hole in the sidewalk along said Pasfield street, which said city had negligently allowed to be and remain in said sidewalk after notice that it existed, as explained in these instructions, then the plaintiff is entitled to a verdict for such sum as in your judgment the evidence and the facts and circumstances in evidence warrants, if any."

The complaint appellant makes of instruction number one, is that "it is simply an abstract proposition of law, not appropriate to the case." It is true that it contains only an abstract proposition of law, and is subject to that criticism, but it is in our opinion a correct statement of the law, defining appellant's duty under the facts in this record, and a proposition of law also appropriate to such facts. And while we consider it not good practice for trial courts to give to the jury instructions containing mere abstract propositions of law, in this case we do not think this instruction improperly influenced the jury against appellant to its injury.

As to instruction number four, we are free to say that it is not drawn with that care that it ought to have been, and for that reason ought to have been refused; yet, we do not feel that the result of the trial in the court below shows that the jury were improperly influenced by it, because the verdict is clearly supported by the weight of the evidence. And besides, other instructions given by the court, at the request of both appellant and appellee, correct all the errors contained in the fourth instruction complained of.

Upon the whole record, we believe the judgment of the trial court in this case is a fair and just disposition of the issues involved, and is responsive to the facts proven, hence we affirm it.

Emery Birks v. S. M. Lutz.

1. VERDICTS—*On Conflicting Evidence.*—The verdict of a jury upon conflicting evidence is conclusive as to questions of fact.

Assumpsit, on promissory notes. Appeal from the County Court of Macon County; the Hon. WILLIAM L. HAMMER, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed December 2, 1897.

D. D. HILL and W. N. ANDREWS, attorneys for appellant.

MILLS BROTHERS, attorneys for appellee.

MR. JUSTICE BURROUGHS DELIVERED THE OPINION OF THE COURT.

Appellee, on the 10th day of April, 1895, sold to appellant and his wife a piano, taking in payment therefor the three notes sued on in this case. At the time of said sale appellant was a minor under the age of twenty-one years. He attained his legal majority on July 20, 1896. When sued on these notes appellant defended on the ground of his being a minor when he gave the notes; appellee insisted he had ratified the sale of the piano after he became of age,

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and promised to pay for it. Appellant denies he had ratified the sale of the piano after he became of age, or that he had promised to pay for it after he became of age.

There was a conflict in the evidence at the trial on the question of ratification and promise after appellant became of age.

The jury and the trial judge believed, from the evidence, that there had been a ratification and promise to pay by appellant after he became of age, and as they saw and heard the witnesses, were in a better position to determine the weight that ought to be given the evidence of each witness, therefore we think we ought not to disturb their finding on these questions of fact. Appellant insists that the trial court erred in its rulings on the evidence and the instructions. We have fully considered such rulings and instructions as appellant has complained of, and are constrained to hold that the trial court committed no reversible error in its rulings on either. A careful consideration of this case compels us to conclude that the judgment rendered is on the right side and might have been for a larger sum without giving appellant any just ground to complain. We therefore affirm it.

John Siegle v. Emma Rush.

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1. INTOXICATING LIQUORS—*When Sales May be Regarded as Willfully Made.*—Sales of intoxicating liquor by a dramshop keeper to a husband after such keeper has been warned by the wife to desist, may be regarded as willfully made, and the fact would be proper for the consideration of the jury in determining the question of vindictive damages.

2. SAME—*Sales Under the Dramshop Act—Sufficiency of Proof.*—Where the ground of recovery charged in an action under the dramshop act is the sale of liquor which has caused habitual drunkenness, the proof should be such that the jury can say that the person charged has sold a sufficient number of times to materially aid in bringing about a state of habitual drunkenness.

Action, under the dramshop act. Appeal from the Circuit Court of Pike County; the Hon. JEFFERSON ORR, Judge, presiding. Heard

in this court at the November term, 1897. Affirmed. Opinion filed December 2, 1897.

W. E. WILLIAMS and H. D. L. GRIGSBY, attorneys for appellant.

The law distinctly bases the right to recover upon an injury to the person, property or means of support of the plaintiff, occasioned by the intoxication of the party to whom the liquor is furnished. *Fentz v. Meadows*, 72 Ill. 540; *Mayers v. Smith*, 25 Ill. App. 67.

WILLIAM MUMFORD, attorney for appellee.

Exemplary damages may be allowed when it appears that sales were made after notice of warning not to sell. *McMahon et al. v. Sankey*, 133 Ill. 636; *Meidel v. Anthis*, 71 Ill. 241.

Exemplary damages, and damages assessed as punishment, mean the same thing, and they may be allowed, in proper cases, after proof of some actual damages. *Hanewacker v. Ferman*, 152 Ill. 321.

Sales to one who is drunk may authorize exemplary damages, upon proof of actual damages. *Betting et al. v. Hobbett*, 142 Ill. 72.

Sales to one known to be an habitual drunkard may authorize exemplary damages. *Kennedy Bros. et al. v. Sullivan*, 136 Ill. 94.

MR. PRESIDING JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

This suit was brought by appellee under the ninth section of the Dramshop Act, to recover damages for injury to her means of support by reason of the habitual intoxication of her husband, caused by the sale of intoxicating liquor to him by the appellant and his agents. She recovered a judgment for \$1,750 against appellant.

A reversal is asked upon the grounds that the court erred in ruling upon the admissibility of testimony, that the evidence does not support a finding for the plaintiff, that the damages are excessive, that the court erred in giving

instructions for the plaintiff and that instructions which should have been given for the defendant were refused.

The evidence shows that five years before the commencement of the suit, appellee was living with her husband and their one child at the village of Detroit, in the eastern part of Pike county. He owned and operated at that place a blacksmith and repair shop and had an unpaid inheritance from his father's estate of between \$3,500 and \$4,000. There were no saloons in Detroit, and none were opened there during the five years immediately prior to the commencement of the suit. Appellant had a saloon at Barry, in the same county, and, with a brother, operated two at Pittsfield during the years 1893 and 1894. In 1892, appellee's husband began the excessive use of intoxicating liquor. The habit grew on him; he neglected his business; he dissipated his property; and before the commencement of this suit, he had squandered his inheritance, had lost his shop, and was left without any means of support. He had become an habitual drunkard and an incumbrance instead of a support to his wife, who, by her needle and by keeping boarders, was supporting the family.

Appellee testified that before her husband had acquired the habits of a drunkard he did a profitable business and provided well for her and the family. We see no reason for doubting the truthfulness of her statements in that regard. That she has been injured in her means of support to the extent of \$1,750 the evidence clearly shows.

It is conceded that damages could not be recovered for sales made more than five years before appellee began her suit. But it was not error in the court to allow her to testify that prior to the five years she had accosted appellant upon the subject of selling liquor to her husband, and that when he acknowledged to doing so, she warned him to desist or she would put the law in operation against him. If she did so warn him, a sale subsequently made could be regarded as willfully made, and the fact would be a proper one to be considered by the jury in determining the question of vindictive damages. We do not think the verdict

can be regarded as including more than actual damages, but at the time the testimony was offered it was proper to go to the jury.

It is most earnestly urged that the proofs do not show that appellant made sales of liquor to appellee's husband which materially aided in producing his habitual drunkenness. Where the ground for recovery charged is the sale of liquor which has caused habitual drunkenness the proofs should be such that the jury can say that the person charged has sold a sufficient number of times to materially aid in bringing about the state of habitual drunkenness. Positive proof of numerous sales is not indispensable, however, to bring them to that conclusion. In this case a careful review of the testimony brings us to the belief that much of the liquor used by appellee's husband during the years 1892, 1893 and 1894, was procured at the saloons of appellant.

Jugs and packages of liquor were frequently brought to him by express and by the mail carrier from appellant's saloons at Pittsfield. It is claimed that neither appellant nor his bartender knew that the liquor was for him and that the person who procured it did not state the name of the purchaser. While we do not think appellant could escape liability for actual damages by showing that the sales were not knowingly made to appellee's husband, we are led to the belief, from all the facts and circumstances in proof, that neither appellant nor his bartender were so ignorant upon that matter as counsel would have us believe. The mail carrier, who procured a jug or two of liquor per week for Rush, was forced to admit reluctantly that he sometimes told the bartender the particular brand that Rush wanted. Appellee herself testified to hearing her husband order from appellant a gallon of his best whisky and seeing him pay for it.

We see nothing seriously wrong with the instructions given for the plaintiff.

The seventh is subject to the greatest criticism. But as that can be regarded as objectionable only for the

Equitable Loan Ass'n v. Lyon & Sons' Lumber Co.

reason that it might lead the jury to infer that it was their duty to award exemplary damages, and we do not regard the damages awarded as including more than actual damages, no harm was done by giving it.

No error was committed in refusing or modifying instructions offered by the defendant. Judgment affirmed.

Equitable Loan and Investment Association v. George S. Lyon & Sons' Lumber and Manufacturing Co. et al.

72 489
174a 31

1. **CONTRACTS—Effect of Laws in Force at the Time of Making.**—The law in force at the time of the making of a contract becomes a part of the contract and fixes the rights of the parties under it, but if the law with reference to the enforcement of the rights of the parties is changed, the law as amended must be followed.

2. **MECHANICS' LIENS—Waiver by Taking Other Security.**—The taking of other security for his debt by a mechanic or material man will have the effect of discharging his lien.

3. **SAME—Rights of Incumbrancers.**—An incumbrancer can insist upon the fact that the taking of additional security by a material man or mechanic will work a discharge of the lien, and he can not be deprived of this right by an agreement between the owner and such material man or mechanic to which he is not a party, and concerning which he had no knowledge.

Bill to Enforce a Mechanic's Lien.—Appeal from the Circuit Court of Macon County; the Hon. EDWARD P. VAIL, Judge, presiding. Heard in this court at the May term, 1897. Reversed and remanded. Opinion filed December 2, 1897.

FIFER & BARRY and W. C. JOHNS, attorneys for appellant.

MILLS BROTHERS, attorneys for appellees.

MR. PRESIDING JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

The George S. Lyon & Sons' Lumber and Manufacturing Company filed a bill at the June term, 1896, of the Circuit Court of Macon County to enforce a mechanic's lien upon

certain premises owned by Frank P. Roddy, for lumber and mill work furnished him in the construction of a dwelling house. Appellant was made a party and filed an answer and cross-bill, setting up that it held a mortgage upon the premises for \$2,000, which it asked to be declared a prior lien.

The only question involved in the controversy was, which company had the first lien?

The Circuit Court found that the lien of appellee was superior, and decreed the payment of the amount due it (\$779.30) out of the proceeds of a sale of the premises first, and the remainder to be applied to the mortgage debt of appellant, found to be \$2,356.09.

On the 26th of February, 1895, appellee and Roddy entered into a contract whereby it was to furnish certain specified material for \$614. No time for delivery or payment was specified, but it was furnished, together with extra lumber and material, amounting to \$117.08, before the 28th of the following August.

While the house was in process of construction, on the 9th of July, Roddy mortgaged the property to appellant to secure a loan of \$2,000.

Early in November appellee accepted a note executed by Roddy and his wife for the full amount of its claim payable in March, 1896, but with the understanding that appellee was to file a lien for the amount of its bill. On the 13th of November appellee filed with the clerk of the Circuit Court its claim for lien, showing that it had furnished on a contract material to amount of \$614, and extras to amount of \$117.08.

Appellant had no notice of the agreement between appellee and Roddy that the taking of the note signed by Roddy and wife was not to be considered as a waiver of the right to a lien.

It is contended by appellant that the claim of lien filed with the circuit clerk is insufficient for the reason that it did not contain an itemized statement of the lumber and mill work furnished, as required by the law in force prior to the

first of July, 1895. By an amendment, which went into effect on that date, the filing of an itemized statement, except for extras, was dispensed with. The contract having been entered into in February, 1895, it is insisted that the old and not the new law should have been followed.

While it is a well settled rule that the law in force at the time of the making of a contract becomes a part of the contract and fixes the rights of the parties under it, yet if the law is changed with reference to the enforcement of the rights of the parties, the law as amended must be followed. The law relating to remedy in force at the time of suit must prevail.

The legislative change, under consideration, related entirely to the remedy. The notice of claim filed, being on the 13th of November, 1895, should follow the amendment of 1895.

An insurmountable obstacle in the way of appellee's right to a mechanic's lien, however, is the note signed by Roddy and his wife. It has been repeatedly held by our Supreme Court that the taking of other security would have the effect to discharge the lien. *Brady v. Anderson*, 24 Ill. 110; *Kinzey et al. v. Thomas*, 28 Ill. 502; *Gardner v. Hall*, 29 Ill. 277; *Croskey v. Corey*, 48 Ill. 442; *Kankakee Coal Co. v. Crane Bros. Manufacturing Co.*, 138 Ill. 207.

It is contended that appellee is not affected by that rule of law, because there was at the time of accepting the note an express understanding between it and Roddy that appellee should file notice of its claim of lien. We entertain no doubt that a lien could be enforced by a material man against the owner where other security had been taken, if, when taken, there was an express agreement that the material man should retain his right to the lien. In other words, Roddy could not in this case invoke the aid of that rule of law.

But appellant had no notice of any such agreement. It was an incumbrancer at the time to the extent of \$2,000. The authorities are clear that an incumbrancer can insist upon the taking of additional security as working a dis-

charge of the lien. We do not think he can be deprived of that right by an agreement to which he is not a party, and concerning which he had no knowledge. The understanding between appellee and Roddy, that the taking of the note, with Roddy's wife as security, should not work a discharge of the lien was secret, and would not be allowed to operate against an incumbrancer. It must be conceded that the rule would be in force both as to Roddy and appellant, in the absence of a specific agreement; and if there be an agreement, it should be enforced only against those who are parties to it.

We think the Circuit Court erred in decreeing that appellee held a superior lien to that of appellant.

The decree will be reversed and the cause remanded, with directions to enter a decree that appellant has the superior lien, and that while appellee's lien has not been discharged, so far as the rights of Roddy are concerned, that it is inferior to that of appellant, and can be paid out of the proceeds of the sale of the property only after the mortgage debt of appellant is satisfied.

Reversed and remanded.

**William Kirkwood, Trustee, etc., et al., v. Elias
Kidwell et al.**

1. APPELLATE COURT PRACTICE—*Assignment of Cross-Errors.*—If an appellee desires to contend that the court below erred in reducing the amount found due him by the master he must assign cross-errors upon the record to that effect.

2. SALES—*By Trustees—Defective Title—Ejected Purchasers.*—When a trustee sold and by a warranty deed conveyed a tract of land, and the purchaser paid for the same and made improvements but was afterward ejected from the land by reason of a defective title, *it was held* that as the estate had had the benefit of the purchase money it was but equitable that the ejected purchaser should have it returned to him.

Petition by Ejected Purchaser of a Trustee.—Appeal from the Circuit Court of Moultrie County; the Hon. EDWARD P. VAIL, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed December 2, 1897.

Kirkwood v. Kidwell.

MEEKER & MEEKER, attorneys for appellants.

B. M. PEADRO, attorney for appellees.

MR. PRESIDING JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

On the 5th of August, 1886, William Elder, who had been acting as the executor of James Elder, deceased, conveyed to J. Meeker and W. P. Corbin a forty-acre tract of land, situated in Moultrie county, to secure them as securities on his bond as executor. Following some litigation which had been instituted by parties interested in the estate, William Elder resigned and J. Meeker was appointed trustee. Corbin then conveyed all interest he had in the land to Meeker as trustee. On the 17th of September, 1887, Meeker, as trustee, sold the land to Elias Kidwell for \$1,100. Three hundred dollars of the purchase money was to be paid to one W. A. Steele, in one and two years, and \$800 to be paid to Meeker as trustee, notes being executed therefor. Kidwell paid off the notes which he had executed to Steele and had paid \$100 and the accrued interest on the \$800 note when a suit in ejectment for the possession of the land was instituted against him by William T. Timmons et al. He was ejected from the land, judgment in favor of the plaintiffs being entered in the Circuit Court and affirmed in the Supreme Court. The litigation over the title to the land was pending several years. In the meantime there were changes made in the trusteeship of the estate of James Elder. Appellant was appointed in December, 1890, and had continued to act as trustee up to the time these proceedings were commenced.

At the April term, 1895, of the Circuit Court of Moultrie County, Kidwell filed an intervening petition asking for an order upon Kirkwood as trustee to pay to him out of the funds of the estate what he had paid as purchase money and what he had necessarily paid out in his efforts to uphold title to the land. In addition to being reimbursed for purchase money he claimed that he should have refunded to

him all that had been expended by him in the defense of the ejectment suit and for improvements. After the pleadings were settled the case was referred to the master, who took the proofs and stated an account, finding that Kidwell was entitled to be paid out of the funds of the estate the sum of \$1,032.95. Exceptions were filed to the master's report, which were in part sustained, but a decree was rendered ordering the trustee to pay out of the funds to Kidwell \$400.

It is earnestly contended that there is no liability against the trustee because in the transaction for the sale of the land Meeker acted merely as a judicial officer and had no power in law to bind the heirs by a warranty deed. We do not think the contract can be looked upon in the light of a judicial sale. When Meeker entered into the contract with Kidwell he was authorized, under his appointment by the court, as trustee, to convey a warranty title to the premises.

It is also contended that the whole transaction was a deal between Kidwell and W. A. Steele, and not one between Kidwell and the trustee. The proofs do not support that contention. While the contract provided for the execution of part of the notes to Steele and he received the money paid on them it clearly appears on its face to be a contract between Kidwell and the trustee, a contract whereby the latter, on Kidwell's paying the notes, was obligated to execute a warranty deed.

It appears from the evidence that Kidwell most earnestly and stubbornly defended the ejectment suit. He paid his money and made improvements on the land in the faith that he would receive a good title. The estate has had the benefit of the purchase money paid and it is but equitable that Kidwell should have it returned to him, even if it be conceded that Meeker exceeded his authority as trustee when he contracted to execute a warranty deed.

We are clearly of the opinion that the evidence supports the decree.

Upon the part of appellee it is contended that the court erred in reducing the amount found due him by the master.

We shall not consider that contention for the reason that cross-errors have not been written upon or attached to the record. Decree affirmed.

Rockford Insurance Co. v. Eliza Cline.

72	495
94	121

1. **INSURANCE—Untrue Statements in the Application.**—An untrue statement in an application for insurance, although made with the knowledge of the applicant, will not render the policy void if the agent of the insurer writing the application had knowledge of the real facts.

Assumpsit, on notes given for a policy of insurance. Appeal from the Circuit Court of Macon County; the Hon. EDWARD P. VAIL, Judge, presiding. Heard in this court at the May term, 1897. Reversed and remanded. Opinion filed December 2, 1897.

D. D. HILL and I. A. BUCKINGHAM, attorneys for appellant.

Where an insurance agent is fully acquainted with the extent and condition of an applicant's interest, his knowledge is chargeable to the company, and if, in making out the policy thereon, he fills in a title different from that he knows the applicant possesses, the company can not, on that ground, avoid the policy after loss. *Home Ins. Co. v. Mendenhall*, 164 Ill. 458; *Rockford Ins. Co. v. Nelson*, 65 Ill. 415; *Lycoming Fire Ins. Co. v. Jackson*, 83 Ill. 302; *American Ins. Co. v. Luttrell*, 89 Ill. 314; *Manufacturers & Merchants' Ins. Co. v. Armstrong et al.*, 145 Ill. 469; *Germania Fire Insurance Co. v. Klewer*, 129 Ill. 599; *German Insurance Company v. Miller*, 89 Ill. App. 633.

A mistaken or untrue statement of a material matter will not avoid the policy when the company knew the real facts; and especially is this true when the agent fills out the application and knowing the real facts, misstates them, either purposely or by mistake. This doctrine is frequently applied in the other important issue often raised as to whether there was other insurance or whether the condition

of the risk as to their building was truly stated. May on Insurance, Secs. 497-499; Wood on Insurance, Sec. 41 and notes.

As a general rule, a party who has been induced to execute an agreement by reason of the fraudulent representations of the other party, may set up such representation in bar of an action on the agreement. But this rule is subject to various exceptions, and one of them occurs when the representations, though false, relate to the legal effect of the instrument sued on. *Clem v. Newcastle, etc., R. R. Co.*, 9 Ind. 488; 68 Am. Dec. 653.

W. E. REDMON, attorney for appellee.

Fraud avoids a contract *ab initio*, both at law and in equity, whether the object be to deceive the public or third persons, or one party endeavors thereby to cheat another. For the law will not sanction dishonest views and practices, by enabling an individual to acquire, through the medium of his deception, any right or interest. *Whitney v. Roberts*, 22 Ill., 381; *Jamison v. Beaubien*, 3 Scam. 113.

MR. PRESIDING JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

This suit was commenced on two promissory notes, one for \$26.25, and the other for \$22.50, executed by appellee for premium on two fire insurance policies issued to her by appellant. It was defended upon the ground that appellee had been imposed upon by appellant's agent who took the notes and wrote the policies.

The contention of appellee was that the agent, one G. J. Dorrell, falsely represented that he was an agent or partner of a Mr. Porter, an agent who wrote policies in appellant's company, and in whom she had confidence, and by such representations induced her to take the policies. She also contended that he falsely made her say in an application for the insurance that she had no other insurance and that by reason of such statement, when in fact she had other insurance, the policies were rendered void.

Even if Dorrell did falsely represent to appellee that he was an agent or partner of Porter, that could not defeat a recovery on the notes. There was no false representation as to the principal, the party bound by the contract of insurance. Appellee knew the company she was being insured in. She had her property already insured in it. As to one of the policies it was but a renewal.

The alleged false statement in the application as to other insurance did not render the policy void. If the fact is as contended by appellee, that the misstatement occurred by reason of Dorrell writing in the application a false answer, certainly the insurance company could take no advantage of it. An untrue statement made in the application, although made with the knowledge of the insured, would not render the policy void, if the agent writing the application knew the real facts. *Rockford Insurance Co. v. Nelson*, 65 Ill. 415; *Lycoming Fire Insurance Co. v. Jackson*, 83 Ill. 302; *American Insurance Co. v. Luttrell*, 89 Ill. 314; *Home Insurance Co. v. Mendenhall*, 164 Ill. 458.

The verdict of the jury was against the law and the evidence and should have been set aside. The judgment will be reversed and the cause remanded for another trial. Reversed and remanded.

Indiana, D. & W. Ry. Co. v. John Koons, Adm'r, etc.

1. *EVIDENCE—Habits of Deceased Persons.*—In actions to recover damages for the killing of a person at a railroad crossing, testimony that the person killed was a careful and prudent man for his own safety, is admissible only in cases where there was no eye witness to the accident which resulted in death, and is then admitted only as a matter of necessity in the absence of better proof.

Trespass on the Case.—Death from negligent act. Appeal from the Circuit Court of Edgar County; the Hon. FERDINAND BOOKWALTER, Judge, presiding. Heard in this court at the May term, 1897. Reversed and remanded. Opinion filed December 3, 1897.

JAMES A. EADS and **SYDNEY E. EADS**, attorneys for appellant.

A person approaching a railroad crossing is bound to know that it is a place of danger, and he must use his senses of sight and sound to discover an approaching train, unless he is so situated that he can not see or hear the approaching train. If he goes upon a railroad track when a train is approaching, that he might have seen in time to stop if he had looked or listened, and fails to look or listen, and is thereby injured, he can not recover damages for such injury; or if he shall permit himself to become absorbed in thought about other matters, and in consequence become oblivious to his present surroundings, he will do so at his peril. *Chicago, R. I. & P. R. R. Co. v. Fitzsimmons*, 40 Ill. App. 360; *Wabash, St. L. & P. R. R. Co. v. Neikirk*, 15 Ill. App. 172; *Wabash R. R. Co. v. Speer*, 39 Ill. App. 599; *Lake Shore & M. S. R. R. Co. v. Hart*, 87 Ill. 529; *Terre Haute & I. R. R. Co. v. Voelker*, 129 Ill. 540; *Chicago, M. & St. P. R. R. Co. v. Halsey*, 133 Ill. 248; *Partlow v. Illinois C. R. R. Co.*, 150 Ill. 326; *Chicago, St. P. & K. C. Ry. Co. v. Anderson*, 47 Ill. App. 91.

When no one was present to see how the accident happened, then and then only is evidence admissible to show the habits of the person as to carefulness and prudence for his own safety. *Chicago, R. I. & P. Ry. Co. v. Clark*, 108 Ill. 113; *Chicago, St. Paul & K. C. Ry. Co. v. Anderson*, 47 Ill. App. 91; *Chicago, B. & Q. R. R. Co. v. Gunderson*, 65 Ill. App. 638.

DUNDAS & O'HAIR and **HENRY S. TANNER**, attorneys for appellee.

MR. PRESIDING JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

This suit was brought to recover damages for the killing of **Elias Koons** at a highway crossing on appellant's railroad at Metcalf Station, in Edgar county, by a passing train. A trial by jury resulted in a judgment in favor of the plaintiff for \$3,500.

The evidence shows that deceased was killed while attempting to cross appellant's railroad with a wagon and team in front of a rapidly moving train soon after seven o'clock on the evening of July 30, 1896. He was seen by no one at the time of the collision except the fireman and engineer. When the fireman first saw him he was ten or twenty feet from the track, driving in a slow trot toward it. He gave the alarm to the engineer, who testified that he at once applied the emergency brake and did all he could to stop the train. The engineer was on the side of the engine opposite to that from which the deceased was approaching the track and did not see him until the horses were in front of the engine.

The evidence does not disclose such a right to recover as would warrant us in affirming a judgment where, upon the trial, errors in ruling upon the admissibility of testimony was committed.

Over the objection of the appellant the court admitted testimony that the deceased was a careful and prudent man for his own safety. Such testimony is only proper in a case where there was no eye witness to the accident which resulted in death. It is then admitted only as a matter of necessity in the absence of better proof. In a case like this it devolves upon the jury to decide whether the deceased was at the time in the exercise of proper care. If there are witnesses who saw the infliction of the injury the jury can determine, from their testimony as to the manner in which the injury was received, whether the deceased was in the exercise of proper care, and evidence of the deceased being generally careful and cautious is inadmissible. *Chicago, Rock Island & Pacific Railway Company v. Clark*, 108 Ill. 113.

In this case there were two eye witnesses who saw the manner in which Koons met his death. The court should have refused to admit the testimony that he was a careful and prudent man, or have excluded it upon appellant's motion, as soon as it was made to appear that there were eye witnesses. The court not only allowed the testimony

to remain with the jury against the protest of appellant, but refused to guard its effect by a proper instruction offered by its counsel. In view of the fact that the case is not a clear one, we think this error sufficient to reverse the judgment. Reversed and remanded.

William S. Pittman v. Harriette B. Pittman.

1. INSTRUCTIONS—*Where there is a Conflict in the Testimony.*—Where there is a controversy in the testimony care must be taken to instruct the jury accurately upon the law of the case.

2. SAME—*Increasing the Measure of Proof.*—In the trial of a suit for divorce, where the complainant charges his wife with adultery, it is error to instruct the jury that more devolves upon him than to show by a preponderance of the evidence that his wife is guilty of the offense charged.

Bill for Divorce.—Appeal from the Circuit Court of Jersey County, the Hon. GEORGE W. HERDMAN, Judge, presiding. Heard in this court at the May term, 1897. Reversed and remanded. Opinion filed December 2, 1897.

Erroneous instructions given for appellee and referred to in the opinion of the court:

No. 4. You are instructed that even though you believe from the evidence that there is a probability of the guilt of the defendant, still you are instructed that you should not for that reason alone find the issue for the complainant. In this case it is not sufficient if the evidence shows a mere probability of the guilt of the defendant. The law requires that the proof should be satisfactory where, as in this case, a divorce is sought from the wife for adultery; and unless there is satisfactory proof of the guilt of the defendant of the actual offense of adultery, it is your duty to find the issues for the defendant.

No. 11. You are instructed that it being important to the well-being of society that the marriage relation should not be severed, the law requires that the proof should be satisfactory when a divorce is sought from a wife for adultery.

No. 13. You are instructed that while adultery may be proven by circumstantial evidence, still the law requires that the proof should be satisfactory in order to establish the charge.

No. 2. You are further instructed for the defendant that the law requires that the complainant, in order to entitle him to a verdict, should establish his case by a preponderance of the evidence; and if the jury

Pittman v. Pittman.

find the testimony so contradictory, or so evenly balanced, that they are unable to arrive at a satisfactory conclusion as to the truth or falsity of the charge against the defendant, then the jury should find the issue for the defendant.

ED. J. VAUGHN and BELL & BURTON, attorneys for appellant.

MARTIN J. DOLAN and HENRY T. RAINEY, attorneys for appellee.

It is impossible to lay down beforehand in the form of a rule, what circumstances shall and what shall not constitute satisfactory proof of the act of adultery, because the same facts may constitute such proof or not, as they are modified and influenced by different circumstances. Bishop on Marriage and Divorce, Vol. 2, Sec. 616.

The circumstances from which adultery may be inferred must be such as to satisfy a reasonable and just man almost beyond reasonable doubt; that is to say, that while the same amount of evidence is not required as in criminal cases, adultery is in fact a crime, and is the most serious of all offenses against marriage, and can be proved only by the clearest, most positive and most satisfactory evidence, and will not be held as proved if the facts on which the charge is based are consistent with innocence. Am. & Eng. Ency. of Law, Vol. 5, 785; Ritzman v. The People, 110 Ill. 362.

An instruction which, standing alone, might mislead, but, is connected with others, which properly limit and qualify its meaning, so that it is clear that the jury were not misled, is not ground for a reversal. Illinois Cent. R. R. Co. v. Swearingen, 47 Ill. 206.

Although part of the instructions given may be open to criticism, yet if, taking them together, as a whole, the law of the case is fairly presented, and justice is done by the verdict, the judgment will not be reversed. Gilchrist v. Gilchrist, 76 Ill. 281.

Although one instruction was not technically accurate, yet, as other instructions upon the same point stated the law very fully and fairly and as the same verdict would un-

doubtedly have been rendered had the instruction been properly modified or wholly refused, the judgment is affirmed. *O'Halloran v. Kingston*, 16 Bradw. 659.

Entire accuracy in expressing the law in instructions is not to be expected in every case, and it is a rule of general application that every slight error that may appear will not be sufficient warrant for reversing the judgment. *Massachusetts M. L. Ins. Co. v. Robinson*, 98 Ill. 324.

MR. PRESIDING JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

This was a bill for divorce, filed by appellant, charging his wife with adultery with one Frank W. Warren. Appellee answered, denying the charge, and upon that issue the case went to trial by a jury which resulted in a verdict of not guilty.

The evidence was circumstantial and voluminous. Inasmuch as we shall be compelled to reverse the decree because of error in instructions and remand the cause for another trial, we shall refrain from discussing it in this opinion. A sharp controversy is shown from an inspection of it and hence there was great necessity of giving instructions which accurately stated the law of the case.

In the fourth instruction given for appellee the court told the jury that "The law requires that the proof should be satisfactory where, as in this case, a divorce is sought from the wife for adultery, and unless there is satisfactory proof of the guilt of the defendant of the actual offense of adultery it is your duty to find the issue for the defendant."

The same was repeated in the eleventh and thirteenth instructions given for her; and in the second they were told that if the testimony was so contradictory or evenly balanced that they were unable to arrive at a satisfactory conclusion as to the guilt of the defendant it was their duty to return a verdict for her.

The effect of these instructions was to take the case out of the rule governing civil cases as to the degree of proof required of a complainant or plaintiff to entitle him to

recover. They told the jury in effect that in the trial of a divorce case where the complainant charges his wife with adultery, more devolves upon him than to show by a preponderance of the evidence that his wife is guilty of the offense. The word "satisfactory," as defined by Webster, means "giving or producing satisfaction; yielding content; especially relieving the mind from doubt or uncertainty and enabling it to rest with confidence." In the light of that definition jurors in the trial of such a case would understand by such instructions that their minds must be convinced of the truth of the charge beyond a reasonable doubt. As we understand it a divorce case where the charge is adultery is no exception to the general rule governing civil cases as to degree of proof.

Instructions of this character have been repeatedly condemned by our Supreme Court as magnifying the burden which the law casts upon the plaintiff in a civil suit. *Herrick v. Gary*, 83 Ill. 85; *Graves v. Colwell*, 90 Ill. 612; *Ruff v. Jarrett*, 94 Ill. 475; *Stratton v. Central City Horse Railway Co.*, 95 Ill. 25; *Rolfe v. Rich*, 149 Ill. 436.

In a line with these instructions was also the following:

15. The jury are further instructed for the defendant, that even though it appears from the evidence that the defendant and Frank W. Warren were in a position where it was possible for them to commit adultery, still, in order to find for the complainant in this case on that issue, they must be seen together not only under circumstances which would make it possible for them to commit adultery, but also under circumstances which can not be accounted for reasonably, under the evidence, unless they had that design.

Because of the error of the court in these instructions the decree must be reversed and the cause remanded for another trial. Reversed and remanded.

72	504
190	20
72	504
115	*506

William Gray v. M. M. Goode.

1. **FRAUD**—*In Procuring the Execution of a Note.*—The fraud necessary to defeat a recovery by a *bona fide* assignee of a promissory note before maturity, must relate to the execution and not to the consideration upon which the note is based.

2. **SAME**—*Of What it Must Consist.*—Such fraud must consist of some trick or device that induces the giving of one kind of instrument under the belief of the maker that he is giving one of a different kind.

3. **NEGOTIABLE INSTRUMENTS**—*Assignee Before Maturity Protected.*—The assignee of commercial paper before maturity, for value, who takes without knowledge of any defense and in good faith, will be protected against the defenses of the maker, even though he purchased under circumstances sufficient to excite suspicion in the mind of a prudent man, and was guilty of negligence in not making an inquiry.

4. **COMMERCIAL PAPER**—*Defenses in the Hands of Purchasers Before Maturity.*—Commercial paper has become such an important factor of exchange that its sanctity and integrity, as a medium of exchange, can not be successfully attacked in the hands of a purchaser before maturity, by anything short of bad faith, and the burden of showing this rests with the attacking party.

Assumpsit, on a promissory note. Error to the Circuit Court of Macoupin County; the Hon. ROBERT B. SHIRLEY, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed December 2, 1897.

J. B. SEARCY, attorney for plaintiff in error.

The assignee, equally with the maker, is bound to use proper diligence; that when agents for the sale of patent rights and such matters, who are strangers, offer to sell promissory notes, a prudent man would have his suspicions aroused from that fact, and should protect himself by inquiry of the apparent maker. *Sims v. Bice*, 67 Ill. 88; *Taylor v. Atchison*, 54 Ill. 196.

KNORR & TERRY, attorneys for defendant in error.

It is earnestly contended, in effect, by counsel for plaintiff in error, that the law of commercial paper as enunciated in *Gill v. Cubitt*, 3 Barn. & Cress. 466, by Lord Tenterden, in 1824, where it was held "that circumstances which ought

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to excite the suspicion of a prudent and careful man about to receive a note or bill, rendered inquiry on his part necessary, and if he failed to make such inquiry he was guilty of negligence, which destroyed his character as a *bona fide* holder," is the law of this State and should govern in this case, and in support thereof Russell v. Hadduck, 3 Gilm. 233; Murray et al. v. Beckwith, 48 Ill. 391; Taylor v. Atchison, 54 Ill. 196; Sims v. Bice, 67 Ill. 88, and Hodson v. Eugene Glass Co., 156 Ill. 397, are cited.

Upon a careful investigation of these several authorities, we think it will be found that they do not establish the doctrine of Lord Tenterden, manifestly relied upon by counsel for plaintiff in error, to be the rule of law in Illinois.

The promulgation of the Tenterden doctrine in England, in 1824, was a striking innovation in the law of commercial paper as it had theretofore existed, and is responsible, we take it, for any and all uncertainties, confusion and conflict of authorities which have since arisen upon the question. Its duration there, however, was so short, and its express and unqualified repudiation by Lord Denman, in 1834, in the same tribunal, in the case of Goodman v. Harvey, 4 Ad. & Ell. 870, wherein it is said—"I believe we are all of opinion that gross negligence only would not be a sufficient answer where the party has given a consideration for the bill. Gross negligence may be evidence of *mala fides*, but it is not the same thing. We have shaken off the last remnant of the contrary doctrine. Where the bill has passed to the plaintiff, without any proof of bad faith in him, there is no objection to his title,"—was so decisive and effective, and so consonant with reason and the necessities of commerce, that it has since prevailed there without question or modification to this day, and is now the accepted doctrine in all the leading American Jurisdictions. Amer. & Eng. Ency. of Law (1st Ed.), Vol. 2, 393; Goodman v. Simonds, 20 How. 343, and authorities there cited; Murray v. Lardner, 2 Wall. U. S. 110; Magee v. Badger et al., 34 N. Y. 247; Seybel v. National Currency Bank, 54 N. Y. 288; Chapman v. Rose, 56 N. Y. 137; Hamilton v. Vought, 5 Vr. (N. J.)

187; Phelan v. Moss, 67 Pa. St. 59; Farrell v. Lovett, 68 Me. 326; Trustees v. Hill, 12 Iowa, 462; Fox v. Bank of Kansas City, 30 Kans. 441; Colson v. Arnot, 57 N. Y. 253; Bank of Sherman v. Apperson & Co., 4 Fed. Rep. 25; Frank v. Lilienfeld, 33 Gratt. (Va.); 377 Schoen v. Houghton, 50 Cal. 528.

We have purposely omitted from the above list of authorities all Illinois citations in support of the Denman doctrine, for the reason that we believe it will better aid the court if they are presented and considered *en masse*, separate and apart from the other authorities.

There may be found some decisions of this court, as in Russell v. Haddock, 3 Gilm. 233, and other cases, where there has been a seeming recognition of the opposite doctrine, as asserted in the instructions, at least to the extent that a purchaser of negotiable paper, with knowledge of any facts and circumstances which would excite the suspicion of a prudent and careful man, is bound to make inquiry, and in neglect thereof will take the paper subject to any equities which may exist between the previous parties to it. But there never has been more than an incidental assumption, without discussion, that such was the rule. It has never been presented before the court as a subject of question, and as such discussed and considered, and a direct adjudication made thereon, and we find nothing in previous decisions which should conclude us from adopting what, upon investigation, we are satisfied is correct doctrine in principle, and the prevailing rule of law. See Comstock v. Hannah, 76 Ill. 530; Shreeves v. Allen, 79 Ill. 553, which expressly sanctions and liberally quotes therefrom; Murray v. Beckwith, 81 Ill. 43, which follows its reasoning; Matson v. Alley, 141 Ill. 284, which unqualifiedly approves and follows the three preceding cases; see also Siegel, Cooper & Co. v. The Chicago Trust and Savings Bank, 131 Ill. 569; Stevenson v. O'Neal et al., 71 Ill. 314; Clarke v. Johnson, 54 Ill. 296; Sherman et al. v. Blackman, 24 Ill. 347; Lampson et al. v. Ill. Trust & Savings Bank, 62 Ill. App. 371; Mahon v. Gaither, 59 Ill. App. 583; Webber et al. v. The Indiana National Bank, 49

Ill. App. 336, which is strongly in point; DeLong v. Schroeder, 45 Ill. App. 236, also strongly in point; Matson v. Alley, 41 Ill. App. 72; Smith v. Culton, 5 Ill. App. 422.

MR. PRESIDING JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

This suit is based upon a promissory note executed by plaintiff in error to one W. S. Bernard and assigned to defendant in error before maturity. It was tried in the court below upon the following agreed state of facts :

“That W. S. Bernard, the original payee of the note in controversy, was a patent right vendor of a wire and slat fence, which, with the appliances for making same, were to enable the vendee to build said fence in certain specified territory for a certain consideration from the persons for whom said fence was built; that said note was given for the right to build said fence in the township of North Otter, in said county; that the defendant, after the making of said note received the appliances or machinery for making said fence, and at his own expense built about one-quarter of a mile of said fence on his own farm. Defendant then received knowledge that one Eke Chapman, of said county, had purchased the patent right for building said fence in said township from said Bernard, prior to date of said sale of same to defendant. The defendant, finding that said Chapman had the prior right of said township, ceased to build said fence, and abandoned all further rights therein in said township.

It is further agreed that the plaintiff, by his agent, H. C. Hamilton, knew that said Bernard was a vendor of patent fencing rights at the time of the purchase and assignment of said note; and that he bought said note at a discount of twenty-five per cent soon after its execution.

That said note was assigned before it was due and that said plaintiff had no knowledge of the want or failure of the consideration of said note at the time of said assignment, and did not receive such knowledge until shortly before said note was due. That said note was made, executed and delivered by the defendant.”

It was tried by the court without a jury and judgment rendered against Gray for one hundred and five dollars and costs.

It is the contention of plaintiff in error that there was fraud in the procurement of the note, want and failure of consideration, and facts within the knowledge of the defendant in error at the time he purchased it, sufficient to put him on inquiry of the maker in reference to the consideration.

There was no such fraud in procuring the execution of the note as would defeat a recovery by a *bona fide* assignee before maturity. The fraud or covin necessary to accomplish that must relate to the execution of the note and not to the consideration on which it is based. The fraud must consist of some trick or device that induces the giving of one kind of instrument under the belief of the maker that he is giving one of a different kind. *Woods v. Hynes*, 1 Scam. 103; *Easter v. Minard*, 26 Ill. 494; *Latham v. Smith*, 45 Ill. 25.

Whether the taking of negotiable paper for value before maturity, under circumstances sufficient to excite the suspicions of a prudent man, takes the purchaser out of the pale of "*bona fide* holder," has been a mooted question in this country and England. About seventy years ago it was the prevailing doctrine of English courts that the purchaser of negotiable paper for value before maturity was not entitled to the privileges of a "*bona fide* holder" when he took the paper under circumstances that should have excited the suspicions of a cautious man. And the Supreme Court of Illinois at an early day recognized that doctrine, as will be seen from an examination of *Russell v. Haddock*, 3 Gilm. 233. It receded from it several years ago, however, and is now planted upon the furthestmost limit of the opposite doctrine. It is now held as the law of this State that the assignee of commercial paper before maturity, for value, who takes without knowledge of any defense, and in good faith, will be protected against the defenses of the maker, even though he purchased under circumstances sufficient to

Dollarhide v. Hopkins.

excite suspicion in the mind of a prudent man and was guilty of negligence in not making inquiry. Commercial paper has become such an important factor of exchange and trade that its sanctity and integrity as a medium of exchange can not be successfully attacked in the hands of a purchaser before maturity by anything short of bad faith, and the burden of showing bad faith rests with the party attacking. *Comstock et al. v. Hannah*, 76 Ill. 530; *Shreeves v. Allen*, 79 Ill. 553; *Murray v. Beckwith*, 81 Ill. 43; *Matson et al. v. Alley*, 141 Ill. 284.

Under the authorities above cited defendant in error was entitled to recover. Judgment affirmed.

Horace Dollarhide v. John H. Hopkins.

1. *PROMISSORY NOTES—Purging of Defenses by Assignment.*—The holder of a promissory note having knowledge of an equitable defense which the maker may have had to it at the time he received it, can not purge it of such defense by merely assigning it to a third party and receiving it back, at a subsequent time.

2. *NOTICE—Waived by Conduct of the Parties.*—A notice required by the terms of a warranty upon the sale of a machine, may be waived by the conduct of the parties entitled to such notice.

Assumpsit, on promissory notes. Appeal from the Circuit Court of Edgar County; the Hon. FERDINAND BOOKWALTER, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed December 2, 1897.

J. W. HOWELL and J. E. DYAS, attorneys for appellant.

DUNDAS & O'HAIR and H. S. TANNER, attorneys for appellee.

MR. PRESIDING JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

This is a suit on two promissory notes, executed by appellee to M. Rumely & Co., and assigned to appellant before

maturity. June 23, 1892, appellant, as agent of Rumely & Co., an Indiana corporation engaged in manufacturing grain separators, sold to appellee, for \$430, a separator for threshing small grain, for which the notes sued on were executed. There was a general warranty that the machine properly handled would thresh and clean grain as well as any other separator of like size in the United States. It was also provided in the said instrument that if the machine failed to perform in accordance with the warranty, notice in writing of such failure should be given to M. Rumely & Co. at LaPorte, Indiana, and to the local agent, Dollarhide, within one week from the time of starting it, when an opportunity should be given to remedy defects, etc.

The machine was put up and started in the threshing of wheat about the 5th of July, and in that work seemed to perform quite well. But when appellee, on the 20th day of July, began threshing oats he found it not suited to that kind of work. It would not clean properly, and wasted great quantities of grain. Appellee at once notified appellant, who wrote Rumely & Co., and a man was sent to examine the machine and put it in condition for good service about August 1st. The machine failing to do the work properly, appellee again notified appellant, and about September 15th Rumely & Co. sent a second man who attempted to make the machine work properly, but he failed. Appellee again notified appellant and insisted upon the machine being put in working order. He saw him several times, and told him that unless it was made to do work properly, he would not keep it. No further attempts were made by appellant or Rumely & Co. to make it work, and appellee returned it to appellant and demanded his notes.

The suit was defended upon the ground that there was a breach of the warranty whereby the consideration for the notes had failed, and that appellant knew it at the time he purchased the notes. The defense prevailed and judgment was entered against the plaintiff for costs. The evidence abundantly shows there was a breach of the warranty and that appellant knew it at the time he purchased the notes;

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but it is contended that appellee could not avail of such defense, because he failed to take advantage of the warranty and notify Rumely & Co. in writing within one week after starting the machine.

It seems that he did notify appellant, and Rumely & Company were also notified immediately after appellee ascertained that the machine would not properly thresh oats. It also appears from the testimony of appellee that appellant promised him that he would not deliver the notes that he had executed to Rumely & Company until after appellee had had a full opportunity of testing the efficiency of the separator in all kinds of small grain. In other words, that the written contract between appellee and Rumely & Company was not to take effect until after appellee had had full opportunity to test. This was denied by appellant, but it was the peculiar province of the jury to decide where the truth was on that matter. If appellant did make such a promise, it may properly be replied that the condition for furnishing a written notice, within the week after starting the machine, was waived.

No objection was made by Rumely & Company either in July, August or September, that no notice in writing had been given of the failure of the machine, but they acted on the notice received, and appellant acted as though the warranty was in full force.

The notes in question were endorsed by Rumely & Company to appellant September 1, 1892, and endorsed by him to the First National Bank of Paris about 11th or 12th of September, but were afterward, and before the commencement of this suit, re-endorsed to the bank by appellant. It is contended, therefore, that even if it be held that there was a failure of consideration by reason of the breach of the warranty, and the condition for notifying Rumely in writing within one week after starting the machine was waived, then such defense can not prevail because appellant, when he received the notes from the bank, received them purged of all defense. In other words the position is that a party having full knowledge of the defense which a maker may

have to a promissory note at the time he received it, may purge it of an equitable defense by merely assigning the notes to a third party and receiving them back at a subsequent time. We can not give our countenance to such a doctrine. Judgment affirmed.

George Hammond v. Mary E. Stewart.

1. **SLANDER—Actionable Words.**—To say to the husband of a woman that her last child was not his child, but was the child of one Clint Mobery, is actionable.

2. **SAME—Sufficient Publication.**—Calling a woman a whore in the presence of her small children, the oldest being six years old, is a sufficient publication of the slander.

Trespass on the Case for Slander.—Error to Circuit Court of Fulton County. The Hon. JEFFERSON ORR, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed December 2, 1897.

CHARLES F. ROBISON and H. W. MASTERS, attorneys for plaintiff in error.

BOYER & TAYLOR, attorneys for defendant in error.

MR. PRESIDING JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

This suit was brought by defendant in error to recover damages for the uttering of slanderous words concerning her by plaintiff in error.

The first count of the declaration charged him with saying to her husband that her last child was not that of her husband but was the child of one Clint Mobery, meaning thereby and charging that she had been guilty of adultery with the said Clint Mobery. The second count charged him with saying to her, in the presence of others, that she was a whore.

There was a trial upon the issue of not guilty and a verdict

Chamberlain v. Chamberlain.

of guilty returned, with damages for defendant in error of \$1, on which judgment was entered.

As grounds for reversal it is contended: First, that the words in the first count claimed to have been spoken are not actionable. Second, that the proofs do not justify the conclusions that the plaintiff in error uttered the words charged against him in either count. Third, that if it be conceded that he called defendant in error a whore as charged in the second count, it was not slander, because not published, he having applied that epithet to her in the presence only of her three small children.

We are clearly of the opinion that the words charged in the first count are actionable and were proven substantially as charged. The husband of defendant in error testified to the uttering of them by plaintiff in error. The defendant in error testified to the plaintiff in error calling her a whore, and that it was done in the presence of her three small children. The plaintiff in error contradicted her and her husband in his testimony, but his reputation for truthfulness was shown to be bad. The jury believed the woman and her husband, and were justified in so doing.

As to the third point urged we hold that the uttering of the vile epithet which plaintiff in error applied to defendant in error in the presence of her three small children was sufficiently published to make him liable on a charge of slander, even if the oldest of the children was but six years of age.

The only error that we see in the record is in the jury fixing the damages at the insignificant sum of \$1, but defendant in error has not complained of it and we therefore affirm the judgment.

Eugene J. Chamberlain v. Bessie Chamberlain.

1. ALIMONY—*An Order in Regard to, Held Not Justified by the Facts.*—This court holds that the evidence in regard to the income and property of the defendant, and his treatment of complainant since the

first order of the trial court, and in regard to the removal of complainant to another house, did not warrant the change made in the order in regard to alimony previously made by said court with the consent of both parties.

Separate Maintenance.—Appeal from the Circuit Court of Pike County; the Hon. JEFFERSON ORR, Judge, presiding. Heard in this court at the May term, 1897. Reversed and remanded. Opinion filed December 2, 1897.

MATTHEWS, HIGBEE & GRIGSBY, attorneys for appellant.

A. G. CRAWFORD, attorney for appellee; W. E. WILLIAMS and W. H. CROW, of counsel.

MR. JUSTICE BUREOUGHs DELIVERED THE OPINION OF THE COURT.

On February 21, 1895, appellee filed in the Circuit Court of Pike County, her bill of complaint in chancery against appellant, setting up their marriage on February 17, 1877, and the birth to them of six children, naming them, the oldest over eighteen years old, the youngest six years old; then follow allegations of cruel treatment of appellee by appellant, then separation from each other and a failure on the part of appellant to support appellee. She prays for a decree of separate maintenance.

At the April term, 1895, of said court, on application of appellee, that court ordered appellant to pay the solicitors of appellee fifty dollars as a solicitor's fee, to enable her to prepare and try her said proceeding, and also ordered appellant to pay appellee, as alimony *pendente lite*, fifty dollars on the first day of each month thereafter, for the support of herself and children, and requiring appellant to pay twelve dollars a month as rent for a certain dwelling house where appellee and the said children were then living, and also ordered that appellant should have the right to room at said dwelling house and to take his meals at the table therein with the rest of the family. This order of court was made by consent of appellant and appellee.

On January 30, 1897, being one of the days of the

November term, 1896, of said court, on motion of appellee, supported by the testimony given in court by her, that court, over appellant's objection "ordered that appellant, in addition to the sixty-two dollars to be paid appellee on the first day of each month, as ordered prior to that time, pay to appellee within twenty days from that date an additional sum of twenty-five dollars, either to her or her solicitor; and a like sum of twenty-five dollars within forty days from this date, the said payment to be in addition to the sixty-two dollars per month heretofore ordered to be paid her by the court." And it was further ordered by that court that all said children of appellee and appellant be kept in attendance at school during school sessions, until the further order of the court. It was also further ordered by the court that the former order of the court, permitting the defendant to room in the house of appellee and family and eat his meals with appellee and family, be modified and changed, so that appellant should not room or eat his meals at the house of appellee and said family. And the cause was then continued to the next term of that court.

From this last order of the Circuit Court, appellant prays an appeal to this court and asks this court to reverse said last order of the Circuit Court. We are satisfied that there were no sufficient facts shown by the testimony of appellee (upon which alone the court acted in making its said last order) to warrant that court to make the same.

The income and property of appellant, and his treatment of appellee since the said first order of that court, together with the removal of appellee and said children to another house which appellee procured at ten dollars per month, as sworn to by appellee herself, did not warrant in our opinion the change in the order of the Circuit Court, before made by it with the consent of both parties.

Hence we reverse the order of the Circuit Court of Pike County, made in this proceeding January 30, 1897, and remand the same to that court for further proceedings therein, as equity and justice may require. Reversed and remanded.

John H. Helm v. John W. Richmond et al.

1. **DRAINAGE**—*Right to Have Water Run in Natural Channel Not Restricted by Act of 1889.*—The owner of a higher tract of land has the right to have the water falling or naturally coming on his premises pass off through the natural drains upon or over the lower or servient lands adjoining, and to construct ditches or drains on his own land to conduct such water into the channel provided by nature, and this right is not restricted or abridged by the drainage act of 1889.

Injunction.—Appeal from the Circuit Court of Champaign County; the Hon. FRANCIS M. WRIGHT, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed December 2, 1897.

J. L. RAY, attorney for appellant.

THOS. J. ROTH, attorney for appellee J. W. Richmond.

CLOUD & KERR, attorneys for appellee Emma C. Johnson;
WHITE & DOBBINS, of counsel.

MR. JUSTICE BURROUGHS DELIVERED THE OPINION OF THE COURT.

Appellant filed in the Circuit Court of Champaign County his bill in chancery against appellees, stating therein that about two years prior to filing his bill, defendant therein, Richmond, together with the commissioners of highways of the township where appellant's land is situated, and one Dunnon, owning the southwest quarter of section three, and one Helgeland, owning the northwest quarter of section three, agreed with appellant that they would pay certain sums of money, as follows: Richmond \$25, Dunnon \$25, Helgeland \$20, commissioners \$10, toward a fund to dig a large open ditch from the north side of section ten, being at the highway north of said section, and construct the same for a certain distance into lands of appellant, and appellant was to construct, dig and deepen the ditch the rest of the distance across his land to the west

Helm v. Richmond.

line thereof, so as to furnish an outlet for the tile proposed to be put in on the lands of said Richmond, Dunnon and Helgeland, and an open ditch of the commissioners of highways, all of whom were given the privilege to drain their lands through tile opening into said ditch; and that in pursuance of said agreement, said parties did aid in the construction of said ditch; that afterward, without the consent of appellant, said Richmond contracted with and permitted appellees Dobbins and Emma C. Johnson, to connect certain tiles draining their lands, with his tiles emptying into said ditch, without the consent of appellant, thereby greatly increasing the amount of water thrown in said ditch upon appellant's land, to his injury, and burdening the said ditch and lands of appellant with additional waters, and some waters that did not naturally flow there; and praying that appellees be required to answer as to the number and size of tiles so connected with the tiles of Richmond, when placed there; and that upon a hearing, said tiles of Johnson and Dobbins be ordered cut off and disconnected from said tiles of said Richmond, and they, Johnson and Dobbins, prevented and enjoined from emptying their said tiles into and through the tiles of said Richmond, into the said ditch of appellant, and permanently enjoined from connecting the same, except by the mutual agreement of appellant and said Richmond, Dunnon, Helgeland and commissioners of highways, as provided by law.

Appellees answer said bill, setting up that their lands are higher than appellant's, and that a natural water-course extends through their lands and appellant's, and that the water from their lands, by nature, drained along said water-course into and through that part of said water-course that is situated upon the lands of appellant, described in his said bill as being injured by such water; that said large ditch mentioned in said bill is but the deepening and cleaning out of said natural water-course; and that the tiles of appellees complained of bring no more water upon appellant's land, described in the bill, than always went there when the lands were in a state of nature.

Said answers also denied substantially all the allegations of the bill. Appellant filed a general replication to said answers. Upon a hearing in the court below the evidence introduced upon both sides, disclosed that the lands of appellees Richmond, Dobbins and Johnson were all north of appellant's, and that the water that fell upon the lands of appellees when they were in a state of nature, all flowed from a northerly to a southerly direction, accumulating into a natural depression (although slight) which passed through the lands of appellees, and extended on through that of appellant; that from time to time open ditches had been made along this natural water-course, to expedite the flow of the water through the same; and such ditches, as they became clogged up, or obstructed, were deepened and cleaned out; that that part of said natural water-course passing through appellant's farm was dug out and deepened into a large ditch by appellant, and by contributions from said Richmond, Dunnon, Helgeland and the Commissioners of Highways, being the ditch described in said bill, and made by contributions as set up in said bill; that tiles were put into the lands of appellees, and they emptied in said ditch, but that said tiles brought no more water into said ditch than would come there without such tiles, and that appellant was in no wise injured by reason of the placing of said tiles there, in the lands of appellees, and connecting them so as to discharge the water therefrom into said ditch. Upon the evidence disclosing these facts, the court below, after the hearing, dismissed appellant's bill and taxed him with the costs.

Appellant appeals to this court and insists that under the statute of June 4, 1889, in force July 1, 1889, Hurd's Statutes of Illinois, 1895, p. 656, appellee Richmond would have no right to connect the tiles of said Dobbins and Johnson with his, and then cause the waters therefrom to flow through this ditch in his land, without the consent of all those who contributed to the construction of the ditch. But we do not so understand the law to be. We are satisfied from the facts proven on the hearing

Snydacker v. Blatchley.

of this proceeding, that the lands of appellees were the dominant lands, and that of appellant was the servient land, and on that account appellees had a clear right to drain the waters that fell upon their lands and naturally flowed upon the lands of appellant, through tiles laid into their land opening into a ditch upon appellant's land, which ditch was opened along the natural water-course through appellant's land; especially as the evidence shows that appellant's land was not injured by having the water brought to said ditch by tiles, instead of open ditches as before the tiles were laid. See *Peck et al. v. Herrington*, 109 Ill. 611; *Wilson v. Bondurant et al.*, 142 Ill. 645; *Lambert et al. v. Alcorn*, 144 Ill. 313.

Therefore we think the court below committed no error in dismissing appellant's bill herein, and we affirm its decree.

Joseph G. Snydacker et al. v. Melbourne E. Blatchley et al.

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177	506

1. **WAREHOUSES**—*Certain Receipts Held to be Warehouse Receipts and on Agreement Held to be a Mortgage.*—The court reviews the evidence in this case and holds that certain of the appellees were holders of warehouse receipts signed by insolvent, and that the written instrument constituting the contract between insolvent and appellants was not a warehouse receipt but a sale by way of mortgage.

Petitions, in assignment proceedings. Appeal from the County Court of Greene County; the Hon. J. C. BOWMAN, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed December 2, 1897.

STATEMENT OF THE CASE.

On July 30, 1896, Melbourne E. Blatchley filed in the County Court of Greene County a deed of assignment to appellee Frank R. Stubblefield, for the benefit of his creditors, and as a part of the property conveyed by this deed of assignment there were 3,461 bushels of wheat at White Hall in said county. Said assignee gave bond as such assignee

and took possession of said wheat. On August 3, 1896, said assignee, on his petition, procured an order of the County Court aforesaid, for him to sell said wheat, the proceeds to be retained by him subject to the further order of the court; and he did sell the same through a St. Louis commission house for the following prices:

No. 2 wheat, 506 bu. 10 lbs. at 59c. per bu.....	\$298.64
Less expenses.....	27.81
Net amount for No. 2 wheat.....	\$270.83
No. 3 wheat, 1,848 bu. 10 lbs. at 54c.....	\$998.01
Less expenses.....	100.58
Net amount for No. 3 wheat.....	\$897.43
No. 4 wheat, 1,106 bu. 40 lbs. at 52c.....	\$564.40
Less expenses.....	60.53
Net amount for No. 4 wheat.....	\$503.87
Total amount of wheat.....	3461 bu.
Net amount realized.....	\$1,672.10

On August 1, 1896, appellants filed in said County Court their petition, as follows:

Petition of Snydacker, Fyffe & Co., filed August 1, 1896, represents that petitioners Joseph G. Snydacker, John L. Fyffe and William J. Fyffe, are partners doing business under the firm name of Snydacker, Fyffe & Co., in Chicago; that on October 12, 1895, Melbourne E. Blatchley, being indebted to petitioners in the sum of about \$3,000 for advances made by petitioners on 6,000 bushels of wheat, executed and delivered to petitioners an instrument in writing conveying and delivering to them 6,000 bushels of wheat stored in his elevator, in the city of White Hall, Greene county, Illinois, which said elevator was then and there a public warehouse of class "B," and by said instrument agreed to procure said 6,000 bushels of wheat to be shipped to petitioners, or their order, as they might direct, which said conveyance and delivery of said wheat was so made by said Blatchley, to petitioners, as security for the indebtedness

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aforesaid; it being provided in said instrument that petitioners might sell said wheat in Chicago, or elsewhere, and from the proceeds thereof, after first paying freight, inspection, insurance and all other expenses incurred on account of said wheat, should pay the indebtedness aforesaid, being the advance made on said wheat, and all other sums owing to petitioners by said Blatchley, so far as the balance of said proceeds would go; it being expressly provided in said instrument that petitioners might at all times deal with the said wheat in all respects as their own, as would appear by reference to said instrument filed with said petition and made a part thereof; that no part of said indebtedness has been paid, and that it now amounts to about \$3,000 after allowing all credits and set-offs; that on July 31, 1896, petitioners demanded of said Blatchley that he procure the 6,000 bushels of wheat, so stored in said elevator, to be shipped and consigned to petitioners, in accordance with the terms of said instrument, but that Blatchley refused to comply with said demand; that on July 30, 1896, said Blatchley made an assignment of all his property to Stubblefield for the benefit of his creditors; that by force of said assignment said assignee, Stubblefield, took immediate possession of the elevator mentioned in said written instrument, and of all the wheat therein, including wheat belonging to petitioners by virtue of said instrument, and continued in possession, and refused to deliver said wheat to the petitioners.

Petitioners pray that Stubblefield, as such assignee, may be required to procure and deliver to petitioners the said wheat so stored in said elevator, to the amount of 6,000 bushels, if so much there be, to be shipped and consigned to petitioners according to the terms of said written instrument, and for further relief.

Prayer for summons against Stubblefield, assignee.

"Exhibit A," attached to the foregoing petition and being the written instrument therein mentioned:

"EXHIBIT A.

GRAIN RECEIPT.

6,000 bushels.

OCTOBER 12, 1895.

I have this day conveyed and delivered unto the possession of Snydacker, Fyffe & Co., of Chicago, Illinois, six thousand bushels of wheat stored in good covered cribs, numbered —, elevator —, and located on lots numbered —, belonging to M. E. Blatchley and situated in the town of White Hall, county of Greene, State of Illinois, each of said cribs being marked with the name —. The above-mentioned wheat is free from all claims and incumbrances except those due Snydacker, Fyffe & Co., and this conveyance is made by way of mortgage to secure the said Snydacker, Fyffe & Co. for their advances and interest on the same at seven per cent. per annum until paid, and commission of not less than one-half cent per bushel, and insurance at least to the amount of their advances, —. I agree upon the request of said Snydacker, Fyffe & Co. to procure the said wheat to be shelled and shipped, consigned to them to their order, as may be directed by them, at my cost and expense, and I guarantee the quality to hold out as stated.

Said Snydacker, Fyffe & Co. may sell said wheat in Chicago or elsewhere, and from the proceeds of such sales pay first the freight, inspection, insurance and interest on their advances, and their commission for selling the said wheat and all expenses incurred on account of said —, and their advances on said wheat and all sums owing them by me, so far as the balance of proceeds will go, and account to me for balance of proceeds, if any. If the net proceeds of the sale of said wheat do not amount to a sufficient sum to pay Snydacker, Fyffe & Co. the charges, advances, interest and commission as aforesaid, I agree to pay such deficiency to them on demand.

The said Snydacker, Fyffe & Co. may at any and all times deal with said wheat, and any and every part thereof, in all respects as their own, accounting to me only for the net proceeds.

This receipt, if assigned by endorsement in blank or other-

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wise on the back thereof, will at once vest the holder with full title and ownership in the property mentioned, with all power herein contained, the same as if issued to the consignee or subsequent holder, subject only to a return of whatever the net proceeds may exceed the holder's claim.

M. E. BLATCHLEY.

No. —."

Intervening petitions of E. V. Baldwin, Loyal P. Griswold and Seth N. Griswold, filed in said County Court on September 7, 1896, represented that the intervening petitioner, E. V. Baldwin, in the months of July and August, 1894, deposited with the insolvent, Blatchley, 482 bushels and 40 pounds of No. 2 wheat, and in the month of July, 1896, 142 bushels and 10 pounds of No. 2 wheat—the wheat to be kept in store by said Blatchley. Said intervening petitioner to pay a storage to said Blatchley of half a cent per bushel per month, commencing thirty days after the same was deposited. That said intervening petitioner, Loyal P. Griswold, in September, 1894, deposited for storage with said insolvent, Blatchley, 419 bushels and 25 pounds of No. 2 wheat, and in July, 1895, deposited for storage with said Blatchley 493 bushels and 35 pounds No. 2 wheat, and in the month of November, 1895, deposited with said Blatchley for storage 426 bushels and 33 pounds of No. 2 wheat, and was to pay said Blatchley half a cent per bushel per month after the expiration of thirty days from the time of deposit. That said intervening petitioner, Seth N. Griswold, in July, 1895, deposited for storage with said insolvent, Blatchley, 354 bushels of No. 2 wheat, and was to pay said Blatchley, as storage, half a cent per bushel per month after thirty days from the time of storage; and that at the time of the assignment of said Blatchley, he had in his possession in his elevator 2,318 bushels and 23 pounds, being the total amount of said deposits which said Blatchley kept for said depositors, and in lieu of the wheat so deposited by them; that the wheat deposited by intervening petitioners was not sold to Blatchley, but stored in his elevator as their wheat and at their risk of fire and subject to the orders of said depositors;

that the said Blatchley delivered the possession of said wheat to said Stubblefield, his assignee, and that said depositors have made demand upon Stubblefield to deliver them their respective amounts of said wheat, which Stubblefield refused to do, and depositors offered to pay storage on said wheat and delivered to assignee the receipts therefor.

Intervening petitioners deny that said Snydacker, Fyffe & Co. have any right to said wheat.

Prayer for relief makes Stubblefield, assignee, and Snydacker, Fyffe & Co. defendants, and prays that the assignee be required to deliver to intervening petitioners, respectively, the several amounts of wheat claimed by them, or, in case said Stubblefield has not said wheat in his possession, he may be directed to pay to the intervening petitioners, respectively, the several amounts of money he may have received for said amounts of wheat, less the storage thereon, and further relief.

Intervening petition of said Samuel P. McCracken, filed October 3, 1896, represents that said intervening petitioner, on July 18, 1895, deposited with the said insolvent, Blatchley, 1,055 bushels of No. 3 wheat to be kept in store by Blatchley as petitioner's wheat, and that Blatchley afterward advanced to petitioner \$100 on said wheat; that at the time of Blatchley's assignment, Blatchley had in his possession in his elevator more than 1,055 bushels of the wheat which Blatchley kept for petitioner, and in lieu of the wheat so deposited by petitioner, and not sold to Blatchley, but stored in his elevator as the wheat, and at his risk of fire and subject to the order of petitioner; that petitioner made demand upon the assignee, Stubblefield, to deliver said wheat, offering to pay the said sum of \$100, with interest and storage, and to deliver the receipt therefor; that said Stubblefield refused to deliver the wheat to petitioner. Petition denies that Snydacker, Fyffe & Co. have any right to said wheat.

Prayer for relief makes Stubblefield, assignee, and Snydacker, Fyffe & Co. defendants, and prays that the assignee may be directed, upon the payment of storage and delivery

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of receipt, to deliver to petitioner said amount of wheat upon petitioner paying assignee the said sum of \$100 with interest, or, in case assignee may not have the wheat in his possession, that he pay the petitioner the amount which he may have received for said wheat so stored for petitioner, less said sum of \$100 and storage, and for further relief.

Answer of Frank R. Stubblefield, assignee, to the petition of Snydacker, Fyffe & Co., filed September 7, 1896, denies any indebtedness from insolvent to petitioners or that insolvent conveyed to petitioners 6,000 bushels of wheat for security or otherwise; that at the date of the assignment, the wheat claimed to have been conveyed to petitioners was not in existence; that insolvent was not a keeper of a public warehouse; that assignee at the time of assignment took possession of the property of the insolvent; that as such assignee, he never has had in his possession the wheat mentioned in the petition; that the instrument in writing mentioned in the original petition created no lien on the wheat described therein if it ever existed, and denies that petitioners are entitled to the relief sought.

Answer of intervening petitioners, E. V. Baldwin, Loyal P. Griswold, Seth N. Griswold and Samuel P. McCracken, respectively, to original petition of Snydacker, Fyffe & Co., filed October 3, 1896, denies that the wheat in the possession of the insolvent at time of the assignment had been sold to Snydacker, Fyffe & Co., or that Snydacker, Fyffe & Co. had bought the same, or had any lien thereon, or any interest therein; that said wheat was kept in store for the use of the intervening petitioners, and in lieu of wheat they, prior to the assignment, had deposited with the insolvent to be kept in store for them, and deny that Snydacker, Fyffe & Co. are entitled to the relief prayed.

Answer of Snydacker, Fyffe & Co., to the intervening petitions of E. V. Baldwin, Seth N. Griswold and Loyal P. Griswold, filed November 23, 1896, denies that said intervenors deposited with Blatchley the several amounts of wheat in their intervening petition specified to be kept in store by Blatchley for them; denies that said Blatchley, at

the time of the assignment, had any quantity of wheat which he kept for the intervening petitioners, in lieu of the wheat specified in the intervening petition; that the said wheat so alleged to have been deposited by said petitioners, Baldwin et al., with said Melbourne E. Blatchley, was not deposited but sold by said petitioners to said Blatchley, and denies that intervening petitioners are entitled to the relief sought.

Answer of Snydacker, Fyffe & Co. to intervening petition of Samuel P. McCracken, filed November 23, 1896, denies that said McCracken on July 18, 1895, or at any other time deposited with Blatchley 1,055 bushels of wheat, or any other quantity, to be kept in store by Blatchley as the wheat of said McCracken; denies that Blatchley at the time of his assignment had any quantity of wheat kept for petitioner McCracken in lieu of the wheat alleged to have been deposited by the said McCracken; that said wheat so alleged to have been deposited by the said petitioner McCracken, with the said Melbourne E. Blatchley, was not deposited, but sold by said petitioner to the said Blatchley, and denies that said intervening petitioner is entitled to the relief by him sought.

Answer of assignee to intervening petition of E. V. Baldwin, Loyal P. Griswold and Seth N. Griswold, filed November 23, 1896, denies that said Baldwin deposited with Blatchley the wheat as set forth in intervening petition, or that such alleged wheat was kept in store by Blatchley for said Baldwin, or that Baldwin was to pay any storage on any of said wheat; also denies that Loyal P. Griswold made any deposit of wheat for storage with the said Blatchley as set forth, or that said Griswold was to pay storage at any time for any of his alleged wheat; denies that intervening petitioner Seth N. Griswold made any deposit of wheat for storage with Blatchley as alleged, or that he was to pay any storage for any such alleged wheat; denies that at the time of the assignment Blatchley had in store any of the wheat claimed to have been deposited by the said intervening petitioners, or that he kept any wheat in lieu of the

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alleged wheat claimed to have been so deposited; denies that the assignee took possession, or had had at any time any of the alleged wheat, or any of the proceeds thereof.

Answer of assignee to intervening petition of Samuel P. McCracken, filed November 23, 1896, denies that said McCracken on July 18, 1895, or at any other time deposited with said Blatchley 1,055 bushels of wheat to be kept in store by said Blatchley for the said McCracken; denies that Blatchley at the date of said assignment had in his possession any wheat whatever kept for said McCracken in lieu of the alleged wheat claimed to have been deposited by McCracken; denies that said McCracken at any time had any wheat whatever in storage with said Blatchley; denies that Blatchley at the date of his assignment delivered to assignee any wheat whatsoever belonging to the said McCracken.

General replication of Snydacker, Fyffe & Co. to the several answers of E. V. Baldwin, Seth N. Griswold, Loyal P. Griswold, Samuel P. McCracken and Frank R. Stubblefield, assignee, filed November 23, 1896.

Replication of E. V. Baldwin, Loyal P. Griswold, Seth N. Griswold and Samuel P. McCracken to answers of Snydacker, Fyffe & Co., and Frank R. Stubblefield, assignee, filed November 23, 1896.

After hearing evidence of parties the County Court made the following final decree, entered December 31, 1896:

"The court finds that the claim of the original petitioners, Snydacker, Fyffe & Co., to the proceeds of the wheat in question is based upon an instrument given by way of mortgage to secure them in the payment of the sum of \$3,000, loaned by them to assignor Blatchley. That the wheat that came into the possession of the assignee, and by order of the court was sold by him, was not, nor was any part of it, the wheat covered by such mortgage instrument, nor was any part of such wheat purchased with the money, or any part of it, advanced or loaned to the assignor by Snydacker, Fyffe & Co.

As to the claim of the intervening petitioners, L. P. Griswold, S. N. Griswold, E. V. Baldwin and Samuel P.

McCracken, the court finds that the assignor was keeping a public warehouse within the meaning of the constitution and statute, that the intervening petitioners deposited with the assignor for storage the wheat represented by the instruments held by them and introduced in evidence, and that such instruments are warehouse receipts.

And the court further finds that the wheat deposited by S. N. Griswold, L. P. Griswold and E. V. Baldwin was of grade two, and by S. P. McCracken, grade three.

The court, therefore, holds that the original petitioners, Snydacker, Fyffe & Co., with reference to the fund arising from the sale of the wheat by assignor, stand in the same relation as general creditors.

The court holds that the intervening petitioners should be reimbursed as far as possible out of the proceeds of the wheat of like kind and grade as that deposited by them, after deducting expenses, commission, etc., and for that purpose should prorate, and that the assignee should retain from each of the intervening petitioners the amount of storage due from each of them; that is to say, E. V. Baldwin, S. N. Griswold, and L. P. Griswold should each pay his proportionate share of the amount of storage due on 506 bushels, and S. P. McCracken the amount due from him on 1,055 bushels, and the assignee should retain from the said McCracken the sum of \$100, the amount advanced to him by assignor prior to the assignment.

It is therefore ordered and adjudged by the court that the original petition of Snydacker, Fyffe & Co. be dismissed, and that they pay the costs occasioned thereby.

It is further ordered and adjudged that the assignee, after deducting seven per cent of the gross receipts of all the wheat in question for commissions, expenses, etc., and after making all the other reductions as directed above, pay to each of the intervening petitioners the following sums of money, to wit:

To S. N. Griswold.....	\$ 33 51
To L. P. Griswold.....	111 56
To E. V. Baldwin.....	52 03

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(To which finding and orders as to the question of storage and amount of wheat belonging to these last named parties and amounts ordered to be paid to them, the said S. N. Griswold, L. P. Griswold and E. V. Baldwin except.)

And to S. P. McCracken.....\$310 77,
and that the assignee pay the costs occasioned by the intervening petitioners as far as the assets charge him.

To all of which findings, judgments and decree of the court, the petitioners Snydacker, Fyffe & Co., and the assignee, Frank R. Stubblefield, severally except and jointly and severally pray an appeal to the Appellate Court for the Third District of this State, which appeal is by the court hereby granted upon said petitioners or said assignee, or either of them, entering into bond in the sum of two hundred dollars, with security to be approved by the court, within forty days from this date, the certificate of evidence to be signed and sealed within sixty days by consent.

JOHN C. BOWMAN, Judge."

In this court only appellants have assigned on the record any error, although appellee Stubblefield, assignee, filed a brief.

COLIN C. H. FYFFE, attorney for appellants.

MARK MEYERSTEIN, attorney for appellee Frank R. Stubblefield, assignee.

THOMAS HENSHAW, attorney for appellees S. N. Griswold, L. P. Griswold, E. V. Baldwin and S. P. McCracken.

MR. JUSTICE BURROUGHS DELIVERED THE OPINION OF THE COURT.

Upon examination of the record in this case we are satisfied that appellees E. V. Baldwin, Loyal P. Griswold, S. N. Griswold and S. P. McCracken established on the trial in the court below the material facts alleged in their petition, and therefore were the holders of warehouse receipts for the grades of wheat they delivered to insolvent, Blatchley, to be

stored in his public warehouse of grade "B" at White Hall, Illinois, at a storage charge of half a cent per bushel per month for the term stated, except the first month, said wheat, or the like grade of wheat, to be by said Blatchley delivered to them on demand, as contended for by them in the pleadings filed in the trial court, and were therefore entitled to a lien on the wheat in question in this case. We are also satisfied that appellants' written instrument set out in his petition to the County Court, constituting the contract between them and insolvent, Blatchley, was not a "warehouse receipt," as contended by them, but a sale by way of mortgage, by insolvent, Blatchley, to them, of 6,000 bushels of wheat, at the date of said writing, then in his elevator at White Hall, and that from the evidence it appears that said Blatchley, long before said assignment, had delivered to appellants the wheat described in said writing, but that said Blatchley still owes appellees the indebtedness contended for by them, but they have no lien on the wheat in question.

We are of the opinion that the final order and decree rendered herein by the County Court of Greene County is in accordance with the law and the evidence in this case, therefore we affirm it.

Decree affirmed.

L. M. Fairbanks v. Owensboro Wagon Company.

1. **CONTRACTS**—*Intention of the Parties Should Control.*—Courts look to the substance rather than the form of contracts and seek for the real intention of the parties, as gathered from all its facts; and this, when ascertained, is the essence of the contract, and to this legal effect is given.

2. **SAME**—*Inaccuracy in the Use of Words.*—This court thinks that the sense in which the parties to this suit understood the word "notes," used in a letter from appellant to appellee, is plain, and that appellant should not be permitted to escape liability in this action because no note for the debt referred to was actually given.

3. **GUARANTY**—*A Contract of, Construed.*—This court thinks a fair construction of the contract of sale and guaranty sued on in this case,

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as it appears from the evidence, is that appellant undertook personally to see to the prompt payment of the amount due appellee for the articles sold.

Assumpsit, on a guaranty. Appeal from the Circuit Court of Piatt County; the Hon. FRANCIS M. WRIGHT, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed December 2, 1897.

C. F. MANSFIELD, S. R. REED and A. C. EDIE, attorneys for appellant.

M. R. DAVIDSON, attorney for appellee.

MR. JUSTICE BURROUGHS DELIVERED THE OPINION OF THE COURT.

This is a suit in assumpsit, brought by appellee against appellant, in the Circuit Court of Piatt County, to recover the sum of \$1,032.25 for a bill of wagons, sold by appellee to one E. E. Garver, upon a written guaranty by appellant that said Garver would pay appellee for the said wagons.

The contract between appellant and appellee is contained in the written order and letters hereinafter copied in this opinion.

On July 12, 1895, a representative of appellee called on said Garver at his place of business in Mansfield, Ill., and took from him an order as follows :

“MANSFIELD, ILL., July 12, 1895.

OWENSBORO WAGON Co., Owensboro, Ky.:

Please ship at once, or as soon thereafter as possible, to E. E. Garver, *via* cheapest route, terms four months note, or five off thirty days (here follows description of wagons), which I agree to pay for, four months note, or five discount for cash in thirty days from invoice, in accordance with the following: No agreements with agents will be recognized unless so stated in order. The title of all goods shipped on this order shall be and remain in Owensboro Wagon Co. until they receive the money therefor. Taken subject to approval of Wagon Co.

(Signed)

E. E. GARVER,

J. L. ADAMS, Salesman.

Mansfield, Ill.”

On the same day this order was taken, the representative of appellee, who took the same, went into the banking house of the Farmers and Merchants Bank, at Mansfield, Ill., and had a talk with appellant, its cashier, touching the financial standing of said Garver; and thereupon appellant wrote across said order the following, to wit: "We would say this account is good and will be promptly met when due."

(Signed) "FARMERS & MERCHANTS BANK,
L. M. FAIRBANKS, Cashier."

The order was then sent to appellee at Owensboro, Kentucky, and it wrote appellant the following letter, to wit:

OWENSBORO, KENTUCKY, 7-18-'95.

MR. L. M. FAIRBANKS, Cashier, Farmers & Merchants Bank,
Mansfield, Ill.

Dear Sir: We are in receipt of an order for twenty-five wagons from Mr. E. E. Garver, and we note the fact that you state in writing, across the face of the order, that "This account will be good, and same will be promptly met at maturity." We find, upon investigation, that Mr. Garver has no credit rating in Dunn or Bradstreet, so we beg to ask whether or not we are to understand that you will be responsible for the amount of this sale. We understand that Mr. Garver is a fine young man, though we simply do in this case as you would likely do by us, and hope to have your early reply, stating that you will see that this claim is paid promptly at maturity. We are anxious to sell Mr. Garver, and our representative has made him such prices that will place him on a competitive basis with any other dealer in your section of the country, and the low prices were made with the view of getting our work properly introduced there. We remain,

OWENSBORO WAGON Co."

To which letter appellant replied on July 19th as follows:

"MANSFIELD, ILL., 7-19-'95.

OWENSBORO WAGON Co.

Gentlemen: Yours of the 18th to hand. We have known Mr. Garver for a long time, also his people, and they are honorable and honest people. We have no hesitancy in

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saying to you we will see to the prompt payment of his notes to you.

Yours truly,

L. M. FAIRBANKS, Cashier."

Upon the receipt of this letter from appellant, appellee shipped Garver the wagons, on his said order. Garver not paying appellee for the wagons, it brought this suit against appellant on March 11, 1896, which resulted in a judgment in the court below in favor of appellee and against appellant for \$983 and costs. And appellant brings the case here by appeal.

In his brief in this court, appellant contends, *first*, that he ought not to be held personally liable in this case, because he says the contract of guaranty does not by its terms purport to bind him personally. But we think a fair construction of the contract of sale and guaranty, as it appears in said written order, the endorsement thereon, and the correspondence between appellant and appellee, and all the evidence contained in this record, is that appellant undertook personally to see to the prompt payment by Garver for the wagons he bought of appellee, under said order. See *Williams et al. v. Miami Powder Co.*, 36 Ill. App. 107; *Stobie et al. v. Dills*, 62 Ill. 432; *Hypes v. Griffin*, Adm'r, etc., 89 Ill. 134; *Sperry v. Fanning et al.*, 80 Ill. 371.

Appellant contends, *secondly*, that the evidence does not show his liability under this contract of guaranty, because the undertaking is "To secure the prompt payment of his (Garver's) notes," and inasmuch as Garver never gave appellee any notes, hence he is not liable in this action.

To so hold, we think would be too narrow a construction of this contract, because when the order, and letters of appellee and appellant are fully read, it is clearly manifest that before appellee approved Garver's order for the wagons and shipped the same to him, it wanted to know of appellant if he would become responsible for the amount of the sale of wagons to appellee (if it should fill Garver's order for the wagons). And appellant's reply to this request was, "We have no hesitancy in saying to you we will see to the prompt payment of his (Garver's) notes to you." And inas-

much as by the terms of the order signed by Garver and known to the appellant before he wrote his letter to appellee, Garver was to give his note to appellee due in four months or pay cash in thirty days with five per cent discount, we think the term "notes," used in appellant's letter to appellee, is easily understood, and when understood, ought not to permit appellant to escape liability in this action. See *Kinsley v. Charnley*, 33 Ill. App. 553.

"Courts look at the substance rather than the form of contracts, and seek for the real intention of the parties, as gathered from all its facts; and this, when ascertained, is the essence of the contract, and to this, legal effect is given." *Smith et al. v. Riddell*, 87 Ill. 169.

Finding no reversible error in the proceedings in the court below, and fully concurring with that court in its construction of the contract of guaranty sued on, we affirm its judgment in this case. Judgment affirmed.

Frederick H. Hill v. James E. Hatfield.

1. *CONTRACTS—In Writing, Can Not be Varied by Parol Evidence.*—All verbal agreements made before or at the time of the execution of a written contract concerning the subject-matter thereof, are conclusively merged into the written instrument, and it can not be added to or changed by parol evidence.

Assumpsit, on the common counts. Appeal from the Circuit Court of McLean County; the Hon. THOS. F. TIPTON, Judge, presiding. Heard in this court at the May term, 1897. Reversed and remanded. Opinion filed December 2, 1897.

N. W. BRANDICAN and LILLARD & WILLIAMS, attorneys for appellant.

If the written contract between appellant and appellee was not the true contract they intended, then the remedy was not to sue at law for the breach of an agreement *dehors* the written contract, but by bill in equity to reform

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the written contract to the true intent of the parties. *Hunter v. Bilyeu*, 30 Ill. 228; *McCornack v. Sage*, 87 Ill. 484; *Sapp v. Phelps*, 92 Ill. 588.

All antecedent, and all contemporaneous verbal agreements, and all conversations and declarations made before, at the time of, and immediately after the execution of the written contract, are merged into the written instrument. *Smith v. Price*, 38 Ill. 29; *Mosher v. Rogers*, 117 Ill. 446; *Coe v. Lehman*, 79 Ill. 173; *Packard v. Van Schoick*, 58 Ill. 79; *Purinton v. Northern Illinois R. R. Co.*, 46 Ill. 297; *Abrams v. Pomeroy*, 13 Ill. 133; *Pickrel v. Rose*, 87 Ill. 263; *Clark v. Crandall*, 3 Barb. 612; *Frost v. Everett*, 5 Cowan, 497; *Wadhams v. Swan*, 109 Ill. 60.

JACOB P. LINDLEY, attorney for appellee.

Evidence is admissible to show that a part only of a written contract was reduced to writing and parol evidence may be introduced to supply the rest of the agreement. *Peterson v. Chicago, R. I. & P. R. R. Co.*, 80 Iowa, 92; *Covel v. Benjamin et al.*, 35 Ill. App. 297; *Nissen v. Genesee Gold Min. Co.*, 104 N. C. 309; *Cumming v. Barber*, 99 N. C. 332; *Terry v. Danville, M. & S. W. R. R. Co.*, 91 N. C. 236; *Sherrill v. Hagan*, 92 N. C. 345.

Evidence to show a verbal collateral promise is admissible to show an additional consideration for the execution of a written contract. *Rice on Evidence*, Vol. 1, 288; *Wood v. Moriarty*, 15 R. I. 518; *Kickland v. Menasha Wooden Ware Co.*, 68 Wis. 34; *Ludeke v. Sutherland*, 87 Ill. 481.

A collateral agreement made prior to or contemporaneous with a written agreement, but not inconsistent with or affecting the terms may be given in evidence. *Erskine v. Adeane*, 8 L. R. Ch. App. 756; *Morgan v. Griffith*, 6 L. R. Exch. 69.

Parol evidence is admissible to establish a contemporaneous oral agreement which induced the execution of a written contract though it may vary, change or reform the instrument. *Ferguson v. Rafferty*, 6 L. R. A. 33, 128 Pa. St. 337; *Rice on Evidence*, Vol. 1, 318; *Nissen v. Genesee*

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Gold Min. Co., 104 N. C. 309; Wanner v. Landis, 137 Pa. 61; Halpin v. Stone, 78 Wis. 183; Peterson v. Chicago R. I. & P. R. R. Co., 80 Iowa, 93.

While it is a general rule that written contracts which are complete and which contain the whole contract can not be varied by parol, this rule is not universal except in respect to contracts relating to personal property. But contracts in respect to the sale and conveyance of land form an exception to this general rule. Rice on Evidence, Vol. 1, 283, Sec. 174; Green v. Batson, 71 Wis. 54; Hahn v. Doolittle, 18 Wis. 206; Chapin v. Dobson, 78 N. Y. 74; Ludeke v. Sutherland, 87 Ill. 481.

An oral agreement of warranty of the quality or quantity of land sold is collateral to the contract of sale. And where an oral contract of sale was made which contained such a warranty and the agreement was reduced to writing not including the warranty, parol evidence of the warranty was admitted. Rice on Evidence, Vol. 1, 264; Chapin v. Dobson, 78 N. Y. 74; Ludeke v. Sutherland, 87 Ill. 481.

The rule that parol evidence is not admissible does not apply where the contract was verbal and entire and only a part was reduced to writing, nor does it apply to collateral undertakings. Greenleaf on Evidence, Vol. 1, Sec. 284a; Rice on Evidence, Vol. 1, 264; Potter v. Hopkins, 25 Wend. 417; Batterman v. Pierce, 3 Hill, 171; Filkins v. Whyland, 24 N. Y. 344; Chambers v. Livermore, 15 Mich. 381.

MR. JUSTICE BURROUGHS DELIVERED THE OPINION OF THE COURT.

Appellant and appellee, at the date thereof, entered into a contract in writing as follows:

"This agreement made and entered into this 26th day of August, 1895, by and between Fred. H. Hill of the one part, and J. E. Hatfield of the other part, *witnesseth*:

That the said Fred. H. Hill agrees to sell to said J. E. Hatfield the west half ($\frac{1}{2}$) of section thirty-five (35), town twenty-four (24) north, range six (6) east of the 3d P. M., McLean county, Illinois, for the sum of twenty-two thou-

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sand six hundred and eighty (\$22,680) dollars. As a part of the purchase price, the said Hatfield is to assume a mortgage thereon for the sum of eleven thousand and two hundred (\$11,200) dollars, the interest on the same to be paid by the said Hill up to March 1, 1896; and by this agreement the said Hatfield agrees to sell to said Hill 193.29 acres of land in section four (4), town twenty-one (21) N., R. 2 E., 3d P. M., being the same land deeded by John C. Short to the said Hatfield, for the sum of fourteen thousand five hundred (\$14,500) dollars. The said Hill is to assume as part of the purchase price, a mortgage of four thousand and five hundred (\$4,500) dollars on said land with interest from March 1, 1896. The balance of purchase money due to said Hill, \$1,480, is to be paid by said Hatfield to said Hill December 1, 1896, the said Hatfield giving to said Hill his note for the same with interest at six per cent after March 1, 1896; the said note to be with approved security; the said Hill is to execute to said Hatfield a good and sufficient warranty deed for the land herein provided to be deeded to Hatfield, and furnish abstract, showing good title to the same. The said Hatfield is to give to said Hill a quit-claim deed for the north half of the southwest quarter ($\frac{1}{4}$) of section four (4), and twenty (20) acres off the south side of the northwest quarter ($\frac{1}{4}$) of section four (4), and a warranty deed for the remainder of the Short farm, and furnish abstract showing good title to such remainder. Deeds are to be executed by both parties September 21, 1895, and left in the hands of Rowell, Neville & Lindley, to be held in escrow, and delivered to the parties respectively, on the 1st of March, 1896, upon the presentation of evidence showing the interest paid on the mortgages respectively mentioned in this agreement.

Each party is to retain possession of the lands herein sold until March 1, 1896, and have the rents and profits thereof, and each to pay taxes on his lands for the present year; that is to say, taxes due for 1895-6 and payable in the spring of 1896.

Each party agrees to forfeit the sum of one thousand dollars as agreed and liquidated damages, payable to the

other, in case of a failure on his part to comply with the terms of this contract.

Signed in duplicate the day and year above written.

(Signed) FRED. H. HILL,
J. E. HATFIELD."

After the making and delivery of said contract the parties thereto, in compliance with the terms thereof, executed and delivered the deeds, paid the interest and took possession of the premises in said contract, as therein provided, giving the note also in said contract provided. After this was done appellee brought this suit against appellant in assumpsit, and on the trial thereof contended that appellant, prior to the execution and delivery of said contract, had represented the west half of section 35 aforesaid contained 330 acres; when in fact, upon a survey thereof, after the execution of said contract and delivery of the deeds and taking possession of the said lands by appellee and appellant, respectively, it was found by actual survey that it contained only 323.43 acres, making it short just 6.57 acres; claiming also that appellant, at the time he made said representation, promised appellee to pay him back the value of this shortage, if any. Appellant's contention in the court below and in this court is, that he never represented his land he traded to appellee contained 330 acres, and that appellee and appellant having made the written contract aforesaid, which is complete, full and unambiguous, the same can not be varied, changed or added to by any antecedent or contemporaneous verbal agreement, but that all conversations and declarations made before, or at the time of the execution of the written contract, are merged into it.

On the trial the court below admitted, over the objections of appellant, evidence tending to show that appellant, before and at the time of the execution of said contract, had represented to appellee that said half-section of land contained 330 acres, and promised, in case of a resurvey thereof by appellee, if it was found to be short of that number of acres, appellant would refund the value of said shortage to appellee; and instructed the jury, at the request of the appellee, in

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case they believed from the evidence that appellant had so represented and promised, and that there was such shortage, then they should find for appellee, etc.; to the giving of these instructions appellant objected and excepted. This, we think, was error, because this evidence and these instructions permitted appellee to vary and add to the written contract of sale, by parol evidence of what was said by the parties before and at the time of making said written contract, which, in our opinion, ought not, under the law, to have been done by the court below.

The jury, upon considering this erroneous evidence, thus admitted, and following the erroneous instructions given by the court, found a verdict for appellee for \$444.18; upon which, after overruling appellant's motion for a new trial, the court gave judgment for appellee.

In his brief appellee insists that this judgment ought to be sustained, on the doctrine laid down in the case of *Ludeke v. Sutherland*, 87 Ill. 481. But we think the facts in this case do not bring it within the rule as laid down in that case; in that case the parties had verbally agreed to a sale of a tract of land, thought to contain 140 acres, at the price of \$27 per acre; but they further agreed verbally, at the time the sale was agreed upon, "that after the deed was made and the consideration paid (the same being computed at 140 acres at \$27 per acre), that the parties were to have the land measured, and if there was more than 140 acres in the tract of land thus conveyed, then the excess should be paid for at the rate of \$27 per acre." The deed was made and the consideration of \$3,780 (being \$27 per acre for 140 acres) was paid in exact conformity with the verbal agreement of the parties. In the deed, as made, the land was described as "containing 140 acres, more or less." The land being afterward measured, as provided for in the verbal agreement, was found to contain 8.74 acres more than 140 acres; upon refusal to pay for this excess, suit was brought therefor at \$27 per acre, and judgment obtained; which was sustained by the Supreme Court upon the ground that the making of the deed was but a part fulfillment of the parol

agreement, and that the further agreement to pay for this excess of 140 acres might be proved by parol, as the proof thereof did not vary or modify the terms and legal effect of the deed which had been made in part fulfillment of the original agreement of sale.

But how is it with the case at bar? Here the contract of the sale of the lands described therein is in writing, and contains all the terms and provisions of said contract. Yet, appellee insists that he ought to be permitted to show that appellant, during the parol negotiations preceding the written contract, had represented that the said half section contained 330 acres, and by reason thereof appellee had paid more for it than he would have, had he then known it only contained 323.43 acres, and that he had secured verbally an agreement from appellant to refund the price of deficit in case, on measurement, it was short of 330 acres. If this was so represented and agreed at the time of the negotiations agreed upon, why was it not incorporated into the written contract of sale, in evidence in this case? To permit it to be shown now would undoubtedly vary and add to this written contract of sale, which can not be done, as all antecedent contemporaneous verbal agreements made before, or at the time of the execution of a written contract, concerning the same subject-matter thereof, are conclusively merged into the written instrument. *Smith v. Price*, 39 Ill. 28; *Mosher et al. v. Rogers*, 117 Ill. 446; *Coey v. Lehman et al.*, 79 Ill. 173; *Packard et al. v. Van Schoick*, 58 Ill. 79; *Pickrel v. Rose*, 87 Ill. 263.

Inasmuch as the court below committed reversible error in admitting the improper evidence complained of in this case, and followed it up by giving to the jury erroneous instructions, based upon this erroneous evidence, the judgment herein based thereupon must be reversed, and we do reverse the same, and remand the case to the court below for such further proceedings herein as do not conflict with the views in this opinion expressed. Reversed and remanded.

Henley Wilkinson v. John H. Adams.

1. **VERDICTS—*Sustained by the Evidence.***—It is the province of the jury and the trial court to reconcile conflicting evidence, and in this case the court can not say that their findings are against the weight of the evidence.

2. **INSTRUCTIONS—*Error Without Injury.***—Where a verdict is in accordance with the clear weight of the evidence, minor inaccuracies in an instruction will not be ground for a reversal.

Assumpsit, for board, lodging, etc. Appeal from the Circuit Court of Greene County; the Hon. GEORGE W. HERDMAN, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed December 2, 1897.

MARK MEYERSTEIN, attorney for appellant.

H. O. TUNISON and THOMAS HENSHAW, attorneys for appellee.

MR. JUSTICE BURROUGHS DELIVERED THE OPINION OF THE COURT.

This is an action of assumpsit brought by appellee against appellant to recover for boarding and lodging of one George Collins, and livery hire furnished said Collins by appellee, all at the procurement and direction of appellant, and at a price agreed to between appellee and appellant before the same was furnished. Appellant pleaded the general issue.

Upon the trial of this case in the court below, appellee swore to the contract made between himself and appellant under which he furnished his salesman, Collins, the board, lodging and livery teams in question, used by said Collins while canvassing for appellant to sell nursery stock for him in Bond county, Illinois, where appellee lives; he was also corroborated as to the material facts in issue, on the trial, by one Armstrong, a friend of appellant, who lives in Bond county, Illinois, and upon whose recommendation appellant took his salesman, Collins, to appellee's hotel in Greenville,

Illinois, to board. Now against these two witnesses we have the evidence of appellant alone, denying that he promised appellee to pay for Collins' board, lodging and livery while canvassing for him. To reconcile this conflict in the evidence, is the province of the jury and trial court, and in this case, we can not say their findings are against the weight of the evidence, but in accordance therewith.

Appellant complains of the court below giving to the jury improper instructions at the request of appellee. We have examined the said instructions complained of, and find none of them contain reversible error; it is true that plaintiff's fourth instruction contains some inaccuracies, and it ought not to have been given, but we are satisfied the jury were not misled by it, inasmuch as their verdict is in accordance with the clear weight of the evidence.

Inasmuch, therefore, as the judgment of the court below, in our opinion, on the whole record is right, we affirm it. Judgment affirmed.

J. B. Harris v. Wm. Dozier.

1. *CONTRACTS—Different Papers Forming a Single Agreement.*—It matters not out of how many different papers an agreement is to be collected, so long as they can be sufficiently connected in sense and are reduced to writing, they constitute one and the same contract; and in this case, although the party wall contract was not made until some days after the making of the promissory note and the execution of the bond for a deed, they should be construed together and regarded as one transaction.

2. *SAME—A Contract Held to be the Contract of a Bank and Not of its President as an Individual.*—The court holds, in view of the evidence, that at the time of the execution of the contract sued on the person with whom appellee contracted was acting for the bank of which he was president, and not in his individual capacity, although the contract was signed by him individually, with the word "president" written after his name.

3. *PARTY WALLS—Contracts Relating to, Binding on Purchasers.*—An agreement between the owners of adjoining premises, whereby one is to build a party wall, one-half on the ground of each, and the

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other is to pay for one-half the cost of its construction when he uses the same, will create cross-easements as to each owner, running with the land, which will bind all persons succeeding to the estates to which such easements are appurtenant, and a purchaser of the estate of an owner so contracting will be required to pay one-half of the cost of the wall, if he avails himself of its benefits.

4. *SAME—A Contract in Regard to, Applied.*—The court holds that the use to which the defendant in this case put the party wall to which this controversy relates made him liable within the terms of the party wall agreement between his grantor and the complainant.

5. *CHANCERY—Relief Under a General Prayer where Allegations are Sufficient to Admit Necessary Proof.*—The court holds that the averments of the bill filed in this case are broad enough to justify the admission of proof that the party wall contract sued on was intended as a contract of the bank owning the land affected, and not of its president individually, and that the prayer for general relief is sufficient to allow the court to give the relief that was granted without a specific prayer for reformation of the contract.

Bill, to enforce a party wall agreement. Appeal from the Circuit Court of Coles County; the Hon. FRANCIS M. WRIGHT, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed December 2, 1897.

J. F. HUGHES, attorney for appellant.

The contract in evidence is the individual contract of Mr. Dunlap, the word "president" added to his name being mere description. *Hately v. Pike*, 162 Ill. 241.

There are no apt words implying an understanding on the part of the bank. *Powers v. Briggs*, 79 Ill. 493.

If this were a proceeding by Dozier against the bank directly for the purpose of holding the bank liable upon the agreement, it might be admissible to show by parol evidence that Dunlap was in fact acting for and on behalf of the bank in executing the agreement, and that the bank was alone interested, and that the credit was given to the bank by complainant, thus giving the instrument a different legal effect from what appears upon its face; but this is not competent or admissible against an innocent third party, a subsequent purchaser for value without notice. *Hypes v. Griffin*, 89 Ill. 134; *Molony v. Rourke*, 100 Mass. 190.

The construction of an independent wall which touched the party wall at several points, but of sufficient strength

to stand for years, although there may be incidental lateral support, was not such a use of the party wall as was contemplated by a contract providing where a party should make use of the wall for a new building, he should pay half of it. *Kingsland v. Tucker*, 115 N. Y. 574.

J. W. & E. C. CRAIG, attorneys for appellee.

There is no question but that this party wall contract runs with the land. *Roche v. Ullman*, 104 Ill. 11; *Gibson v. Holden*, 115 Ill. 199; *Holden v. Gibson*, 16 Ill. App. 411; *Tomblin v. Fish*, 18 Ill. App. 439; *Behrens v. Hoxie*, 26 Ill. App. 417.

The bill containing a prayer for general relief the specific prayer for reformation of the contract was unnecessary. Vol. 3, *Ency. Pleading & Practice*, 347; *Walker v. Converse*, 148 Ill. 622; *Hopkins v. Snedaker*, 71 Ill. 449; *Holden v. Holden*, 24 Ill. App. 106; *Davidson v. Burke*, 143 Ill. 139.

The contract was properly reformed against a subsequent purchaser with notice. *West v. Madison Co. Agl. Bd.*, 82 Ill. 205; *Bent v. Coleman*, 89 Ill. 364; *Erickson v. Rafferty*, 79 Ill. 209; *Merrick v. Wallace*, 19 Ill. 486.

Appellant had sufficient notice, the contract being in his apparent line of title and recorded. *Bent v. Coleman*, 89 Ill. 364; *Erickson v. Rafferty*, 79 Ill. 209; *Babcock v. Lisk*, 57 Ill. 327; *Parker v. Merritt*, 105 Ill. 293; *Chicago, R. I. & P. Ry. Co. v. Kennedy*, 70 Ill. 350; *Grundies v. Reid*, 107 Ill. 304.

The visible appearance of the property was enough to put appellant on inquiry and therefore to give him notice. *Rock Island & P. Ry. Co. v. Dimick*, 144 Ill. 628; *Russell v. Hubbard*, 59 Ill. 335.

Appellant made use of the wall within the meaning of the contract. *McEwen v. Nelson*, 40 Ill. App. 272; *Greenwald v. Kappes*, 31 Ind. 216; *Kingsland v. Tucker*, 44 Hun (N. Y.), 91.

MR. JUSTICE GLENN DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree of the Circuit Court of Coles County rendered against James B. Harris, W. B.

Harris v. Dozier.

Dunlap and the First National Bank of Mattoon, defendants in the court below, and in favor of William Dozier, complainant, wherein the appellant is charged with one-half of the cost of the construction of a party wall, constructed by appellee, under a written contract with the First National Bank of Mattoon, upon the dividing line between adjacent lots in the city of Mattoon.

From this decree James B. Harris, the present appellant, prayed an appeal to this court, W. B. Dunlap and the First National Bank of Mattoon not joining in the appeal.

The facts in this case seem to be as follows: The First National Bank of Mattoon being the owner of the west twenty feet of lot 4, in block 118, in the city of Mattoon, sold on the 28th of June, 1890, these premises to appellee for the sum of \$900, and in payment for this lot appellee gave his note payable on or before five years from date. The bank gave him a bond for a deed, by which the bank bound itself to make him a deed for the premises upon the payment of the note. At the time of the making of this sale, and the making and the delivery of the bond and promissory note, appellee and W. B. Dunlap, representing himself to be acting for the First National Bank, made a verbal contract for the building of a party wall on the line between lots 4 and 5 in block 118, to be built of stone and brick, and to be built by appellee at his expense. Dunlap at this time represented to him that the bank owned both the lots. Subsequently on the 6th day of August 1890, this verbal agreement was reduced to writing, and is as follows:

“This agreement made this 6th day of August, 1890, between William Dozier of the first part and William B. Dunlap, president of the First National Bank in said county and State, of the second part, witnesseth:

That William Dozier doth covenant and agree to and with said W. B. Dunlap that he will erect a brick wall, stone foundation, on the line between lots 4 and 5 in block 118, original town of Mattoon, one-half of the wall to be on each of said lots, to be erected at the expense solely of said Dozier and to be entirely under his control until the party of the

second part, their heirs and grantees, shall desire to build to the same as hereinafter provided.

And W. B. Dunlap doth covenant and agree to and with said Dozier that the party of the second part will allow him to build the aforesaid wall one-half each on lots 4 and 5, and if the party of the second part, their heirs, assigns or grantees, desire to build on to the said wall they are to pay to the said Dozier, his heirs, assigns or grantees, one-half of the value of said wall at the time such joint is desired, and if the value of such half can not be agreed upon, each party shall elect one disinterested person, and the two so selected shall select a third, and their determination shall be binding, such payment to be made before any use of the wall is made by the second party, and when so paid for said one-half wall shall be the property of second party.

Witnesseth our hands and seals the day and year above written.

WILLIAM DOZIER, [SEAL.]

W. B. DUNLAP, President. [SEAL.] ”

This contract was filed for record August 26, 1890. Although this contract is signed by W. B. Dunlap as “president,” and he describes himself in the body of the instrument as “president ” of the First National Bank, there is no doubt from the proofs in the case but he was acting for the First National Bank of Mattoon, and appellee so understood the matter at the time.

James B. Harris, the appellant, purchased of the First National Bank of Mattoon, for \$1,800, the east half of lot 5, block 118, original town of Mattoon, on the 13th day of September, 1892, and the bank made, executed and delivered to him a deed for the premises the same day.

On the 24th day of March, 1892, W. B. Dunlap and wife conveyed to the First National Bank of Mattoon twenty feet off of the west side of lot 4 and lot 5, and the east half of lot 6, all in block 118, original town of Mattoon.

On the 24th day of June, 1895, the First National Bank of Mattoon conveyed to William Dozier twenty feet off of the west side of lot 4 in block 118, original town of Mattoon.

Harris v. Dozier.

The appellant commenced the erection of a building on the east half of lot deeded to him by the First National Bank, in April, 1895, and completed the same during that summer. The rear and west walls of this building were brick. The first story of the front was iron, the second brick. On the east of this building, and next to the party wall he built what he styles a "studded" wall, made of four by fours, placed fourteen inches apart, lining the first story with boards, and lathing and plastering the second story. At places it touched the party wall, at others it was cemented to the same to keep the water out, and at one place the brick were chipped off the party wall to get the timbers of the "studded wall" in place and up to the party wall. It protects his wall from the rain, storm, snow, sleet, wind, cold and heat.

At the time appellant erected his building the party wall was worth \$250. The bill filed set forth the facts substantially as herein stated, and asked that appellant be made personally liable therefor, and that the value thereof be declared a lien on the east half of lot 5, block 118, original town of Mattoon.

Appellant and the First National Bank of Mattoon answered, denying the allegations of the bill. W. B. Dunlap was defaulted.

The court, among other things, found that the contract entered into for the erection of the party wall was the contract of the First National Bank of Mattoon; that appellant as the assignee was personally liable for the value thereof, the sum of \$250. The court also found that he had erected a building on the east half of lot 5 and had joined to the party wall. A personal decree was rendered against him for the payment of the amount found due within thirty days, and in default of payment it was ordered that a sale be made, as in cases of foreclosure.

It is urged that the court erred in finding that the party wall contract was one between the First National Bank of Mattoon and appellee. It seems the legal title to the east half of lot 5, block 118, original town of Mattoon, was in

W. B. Dunlap, and the equitable title was in the First National Bank of Mattoon. By the evidence it stands uncontradicted that at the time the bank sold the west half of lot 4 to appellant, the contract for the party wall was entered into between appellee and Dunlap acting for the bank; that appellee would not purchase unless the contract for the party wall was made. Although the party wall contract was not made until some days after the making of the promissory note and the execution of the bond for a deed, yet they should be construed together and regarded as one transaction. It matters not out of how many different papers it is to be collected, so long as they can be sufficiently connected in sense, and are reduced to writing, they constitute one and the same contract. This principle is elementary. Construing this party wall contract and the bond for a deed and the promissory note as one contract or transaction, it would seem evident that Dunlap, at the time of the making and delivery of the bond for a deed, the promissory note, and the party wall contract, was acting for the bank.

The fact that he described himself in the body of the party wall contract as "William B. Dunlap, president of the First National Bank," and signed his name to the same as "W. B. Dunlap, president," is a circumstance tending to show that he was acting for the bank. This in connection with the fact that at the time the sale was made, and during their negotiations, he told Dozier that these lots belonged to the bank, make it evident he intended and thought he was acting for the bank, and not in his individual capacity when he signed the contract. It is averred in the bill that Dunlap, who was president of the bank, signed his individual name to the contract as president by mistake and error, when he should have signed it by the corporate name, the "First National Bank of Mattoon."

The averments in the bill are broad enough to allow this proof, and the prayer of the bill for general relief, that appellee may have such other and further relief as to equity may seem meet, is sufficient to allow the court to grant the relief that was granted.

It is next urged that the court erred in finding appellant personally liable on the party wall contract, and in making the amount found due thereon a lien on the east half of lot 5, because he had no notice of the existence of such contract.

The question as to whether the covenants and stipulations in a party wall contract, for the construction of a party wall between the adjacent proprietors, such as entered into by the parties in this case, are such as run with the land, is no longer an open question.

The Supreme Court say in the case of *Roche v. Ullman*, 104 Ill. 11: "We think the decided weight of authority establishes the position that an agreement under the hands and seals of such parties, containing covenants and stipulations like those found in the instrument we are considering, will, when duly delivered and acted upon, as was done in this case, create cross-easements in the respective owners of the adjacent lots, with which the covenants in the agreement will run so as to bind all persons succeeding to the estates to which such easements are appurtenant. This being so, it follows that Roche, in succeeding to the east half of the lot, whereby he acquired an easement in the west half, became bound for the performance of the covenant to pay one-half the costs of constructing the wall. We do not think it necessary to enter upon a review of the authorities upon the subject, but will content ourselves with a reference to the following cases, which are believed to sustain the conclusion reached: *Keteltas v. Penfold*, 4 E. D. Smith, 122; *Savage v. Mason*, 3 Cúsh. (Mass.) 504; *Maine v. Cumston*, 98 Mass. 317; *Standish v. Lawrence*, 111 Mass. 111; *Dorsey v. St. Louis, Alton & Terre Haute R. R. Co.*, 58 Ill. 68; *Rindge v. Baker*, 57 N. Y. 209; note to *Spencer's case*, *Smith's Leading Cases*, 68; *Weyman's Ex'rs v. Ringold*, 1 Bradf. 40; *Giles v. Dugro*, 1 Duer, 331."

One-half of the party wall rested on the east half of lot 5, block 118, original town of Mattoon. Appellee was in the open, notorious and exclusive possession of the party wall at the time appellant purchased the east half of lot 5. The party wall contract was recorded on the public land records

of Coles county at the time and for some time before appellant's purchase. These circumstances establish the fact that appellant had constructive notice, which is sufficient in this case. In fact this notice has the same force and effect as actual notice. These principles are so well settled that a citation of authorities would seem unnecessary.

It is contended by appellant that when he erected his building on the east half of lot 5, he did not "build to" or "build onto" said party wall, or did not join to it.

It is clear by the terms of this party wall contract that the parties in entering into it, contracted for the use of a party wall, that it would be used and joined to in the usual manner that such connection is made. The appellee would not enter into a contract for the purchase from the bank of the west twenty feet of lot 4 for the consideration of \$900 unless the bank would make the party wall contract. By the terms of the contract appellee built such party wall, one-half on his premises and the other half on the premises of the bank. It was built of stone and brick, and it was a good and substantial wall for the purposes for which it was built. The bank or its assignee was to pay him what it was worth when they should come to use it. It was never intended to be used as the appellant has attempted to use it, as a protection against the rain and snow and wind and cold and heat, and built as close to appellant's building as his ingenuity could build it without being actually attached to it, and by lashing the two walls together with cement to keep the water out of the cracks between them.

This the proofs show is what appellant did. Under this proof he is liable under the contract, for he has used the party wall.

He can not avoid liability by the shift or device resorted to as a defense in this case.

The chief purpose of party walls is to avoid expense and save space.

The contract should receive such construction as will carry out the intention of the parties.

Counsel for appellant rely on the case of *Kingsland et al.*

v. Lucker et al., 115 N. Y. 574, as sustaining their contention. That case is distinguishable from this. In that case the party wall was found not to be in a proper or fit condition to be used. In this case the preponderance of the evidence shows the party wall built by appellee was in a proper and fit position to be used.

Our holding in this case is sustained by the case of Greenwald v. Kappes, 31 Ind. 216; McEwen v. Nelson, 40 Ill. App. 272.

The decree of the Circuit Court will be affirmed.

Chicago, Peoria & St. Louis R. R. Co. v. Charlotte Woolridge, Adm'x.

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1. **DAMAGES**—*To Next of Kin, by a Death Caused by Negligence.*—In order to permit the next of kin to recover more than nominal damages, in a suit by an administrator to recover for the wrongful killing of his intestate, the proof must show that they were supported, in whole or in part, by the deceased, or that he was bound by law to support them because they were in a state of dependence.

2. **SAME**—*Death Caused by Negligence—Evidence to be Considered.*—In a suit by an administrator to recover for the wrongful killing of his intestate, it is proper to admit evidence to show that a son of the deceased, over twenty-one years of age, was at the time his father was killed, so crippled with rheumatism in his right hip that he was unable to work and earn a living, and that he was dependent on his father for his support.

3. **VERDICTS**—*When They Should Stand.*—Unless a verdict is clearly contrary to the evidence, and can be considered only as the result of passion, prejudice or a palpable misapprehension of the facts, it is not the province of a court of appeal to interfere. If the record contains evidence upon which the finding can be fairly and reasonably based, it should not be set aside though there is other and adverse testimony which, as it appears in the record, seems to a court of appeal to preponderate.

4. **RAILROADS**—*Running Train Backward Where Many Persons are Passing.*—The dictates of common prudence should admonish the employes of a railroad company that to run a train backward at a speed of eight or ten miles an hour, at a place where many persons are passing

to and fro, and there is much confusion and noise, is an exceedingly hazardous thing to do.

4. *SAME—Failure to Look and Listen Not Negligence Per Se.*—The failure of a person going upon a railroad track to look and listen for an approaching train, is not negligence *per se*; it is for the jury, under proper instructions and considering all the attending circumstances, to decide whether such a failure is negligence or not.

5. *SAME—Presumption as to Movements of Persons On or Near Track.*—Whether the presumption obtains that a man will not go on or will get off a railroad track in front of an approaching train, depends upon the circumstances surrounding the parties at the time. Such a presumption does not exist as an abstract proposition of law.

6. *INSTRUCTIONS—An Instruction as to Damages in a Personal Injury Case Sustained.*—An instruction in a personal injury case, telling the jury that if the evidence shows that the person injured was, at the time of the accident, in the exercise of due care for his own safety, that the defendant was guilty of the negligence charged in the declaration, and that such negligence was the cause of the injuries complained of, "then the plaintiff is entitled to recover in such sum as, in your judgment, the evidence warrants," is not subject to the objection that it places no limitation on the damages which may be recovered.

Trespass on the Case, for personal injuries. Error to the Circuit Court of Sangamon County; the Hon. ROBERT B. SHIRLEY, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed December 2, 1897.

WILSON & WARREN, attorneys for plaintiff in error.

S. H. CUMMINS, attorney for defendant in error; CONKLING & GROUT, of counsel.

MR. JUSTICE GLENN DELIVERED THE OPINION OF THE COURT.

This was an action on the case by the defendant in error, as administratrix, to recover damages from plaintiff in error for negligently causing the death of her husband, John A. Woolridge. Upon a trial of the cause the issues were found for defendant in error, and her damages assessed at three thousand dollars. A motion for new trial was overruled by the court and judgment rendered upon the verdict.

The plaintiff in error operated a branch track which runs along and parallel with the Chicago & Alton branch track, both going into the Illinois State Fair Grounds, at

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the southeast corner thereof, the same only being operated during the time the Illinois State Fair is being held, when they only operate the road for the purpose of conveying passengers to and from the fair grounds. Since said railroad companies have been operating their tracks as aforesaid, the deceased, John A. Woolridge, who had resided in the city of Springfield for many years, was employed by the Chicago & Alton Railroad Company; not as a regular switchman or flagman for the company, nor had he ever been in the employment of the Chicago & Alton Railroad Company except for the one week that the Illinois State Fair was held. At this time he had been employed by the Chicago & Alton Railroad Company as a flagman for that company, and stationed at and near to the place where the said Chicago & Alton Railroad Company enters the fair ground. He had only been on duty one day and a half when he was struck by the train of plaintiff in error and killed. The plaintiff in error also had a flagman stationed at the south side of Sangamon avenue, a distance of about one hundred feet from where the deceased was, and for the purpose of flagging trains on its road. These two flagmen were all that were there for that purpose.

The facts further are that it was Soldiers' Day, Tuesday; that it was one of the main entrances to the State Fair Grounds, both for foot passengers and vehicles; that there were many stands, vendors of various articles, both inside of the Illinois State Fair Grounds and the outside; that trains were constantly passing and repassing in and out of said fair grounds; that just a moment before the deceased was struck he had been on the east side of the tracks, had eaten his dinner, picked up his flag and started to his post of duty.

When he arrived there he stopped about eighteen feet south of the gate entrance of the fair grounds and flagged for the Chicago & Alton train, which was at that time leaving the fair grounds for the city, and that while he so flagged for that train, with his attention directed to the safety of travel from the place where he was stationed as flagman, he was struck from behind on the head by a train of the

plaintiff in error and received injuries from which he shortly thereafter died. The only experience the testimony in this case shows he had, was the one and a half days' previous work; that he had each year flagged for the Chicago & Alton Railroad Company for the six days while the fair was in session.

The court below allowed defendant in error to prove over the objection of plaintiff in error, by Clarence Woolridge, who was over twenty-one years of age, that at the time his father was killed he was so crippled with the rheumatism in his right hip that he was unable to work and earn a living and was dependent upon his father for his support. The admission of this proof it is claimed was error. The gravamen of this action as defined by the statute is, in every such action, the jury may give such damages as they shall deem a fair and just compensation, with reference to the pecuniary injuries resulting from such death to the wife and next of kin of such deceased person, not exceeding the sum of \$5,000.

When the relation of husband and wife or parent and child exists the law presumes pecuniary loss from the fact of death. *Holton v. Daly*, Administrator, 106 Ill. 131; *City of Chicago v. Scholten*, 75 Ill. 468; *Chicago & N. W. R. R. Co. v. Swett*, 45 Ill. 197.

Where the relation of parent and child exists, although the law presumes pecuniary loss from the fact of death, yet these damages may be enhanced by evidence of the mental and physical capacity of the child to be of service to his father in his business, and his habits of industry and sobriety, where he is old enough to have established a character; these are elements to be considered in assessing the pecuniary loss sustained. *City of Chicago v. Scholten*, *supra*.

In case the relation of husband and wife exists the same rule obtains in estimating the pecuniary loss sustained by the wife. The husband's capacity and ability to earn money, his habits of industry and sobriety, the amount of his usual earnings, and that the deceased was her husband in life, and that they had minor children whom he was by law bound to support and who usually shared his income, are proper

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matters of proof to be considered in fixing the damages. *Chicago & N. W. R. R. v. Moranda*, 93 Ill. 302, 304.

Where suit is brought by the next of kin who are collateral kindred of the deceased, and have not been receiving from him pecuniary assistance, and are not in a situation to require it, only nominal damages can be recovered, no difference how close such collateral relationship may be. But if on the other hand, the next of kin consists of collaterals whom the deceased in life was not bound to support, unless in a state of dependence, and who have received pecuniary aid from him in whole or in part for their support, there is no difference how remote the relationship, there has been a pecuniary loss for which damages must be given. *C. & N. W. R. R. Co. v. Swett*, *supra*; *Chicago & A. R. R. Co. v. Shannon*, 43 Ill. 338; *City of Chicago v. Scholten*, *supra*; *C. & N. W. R. R. Co. v. Moranda*, *supra*. It therefore follows, for the next of kin to recover more than nominal damages, the proof must show the next of kin were supported in whole or in part by the deceased, or that he was bound by law to support them because they were in a state of dependence. This is the character of the evidence complained of. The witness testifies that at the time of his father's death, he was entirely dependent on him for his support; this state of his dependency was created by his physical condition. Without this state of dependency his father would not have been bound by law to support him, as he was over twenty-one years of age. His father being bound to support him, any fact or circumstance which tended to establish the existence of this state of dependency was material and proper. Without this, only nominal damages could be recovered. Even if this evidence were improper, the admission of it is not error for which this case should be reversed. It could only affect the amount of the verdict, and as the amount is not excessive, the verdict of the jury should not be disturbed for this reason.

It is claimed on the part of plaintiff in error that the verdict of the jury is contrary to the manifest weight of the evidence. To maintain this contention we are referred to

the case of Chicago & N. W. R. R. Co. v. Sweeney, 52 Ill. 325, as being in all respects like the case at bar.

"In that case the deceased, with his shovel in hand, with a cap upon his head drawn closely down over his ears, and without looking to the right or left or behind him, stepped upon the track of the Ft. Wayne road, a few feet north of the point where the 'Y' joins it, and while cars pushed by an engine were being backed over the 'Y' onto the track of the road, was run over and killed, deceased having his back to the car when he was killed." In this case the deceased was, at the time he met his death, surrounded by a very different set of circumstances. The place was at the intersection of two public streets, at which place the plaintiff in error and the C. & A. R. R. Co. had parallel tracks running over such intersection into the Illinois State Fair Grounds. The deceased was the flagman for the C. & A. road. The C. & A. train was coming out of the fair grounds; plaintiff in error's train was backing in, with an engine with two or three passenger cars attached, at a speed of from eight to ten miles an hour. The place where deceased was struck was some fifteen or eighteen feet from the gate or entrance to the fair grounds, where the cars or persons on foot and in vehicles passed in and out. At this time there were a number of persons passing in and out. In close proximity to this place there were two saloons, vendors of various kinds of merchandise, and fakirs, who contributed to make considerable noise. Just the instant before the deceased was struck he was flagging back a man who was about to cross the C. & A. track on which a train was coming out of the fair grounds. As this train passed, he, being between the tracks, stepped back a step or two toward the track of the plaintiff in error, and the train of plaintiff in error struck him and killed him, without his knowing it was approaching.

While flagging the man back who was approaching the C. & A. track, there were several calls "Look out!" These, no doubt, the deceased did not hear, or if he did hear them, supposed they were addressed to the man he was flagging.

That this case is not like the Sweeney case, *supra*, is quite apparent to us. The dictates of common prudence should have admonished the employes of plaintiff in error that to run a train backward, when so many persons were passing to and fro, and where there was so much confusion and noise, and also when meeting a train on the C. & A. road, at a speed of from eight to ten miles an hour, was an exceedingly hazardous thing to do. The train should have been slowed up and been under the complete control of the employes of plaintiff in error at this place.

It is a well settled rule in this State, that unless the verdict of the jury is clearly against the evidence, and can be considered only as the result of passion, prejudice, or a palpable misapprehension of the facts, it is not the province of the court for that reason to interfere. If the record contains evidence upon which their finding can be fairly and reasonably based, we are not at liberty to set it aside, though there is other and adverse testimony which, as we read it in the record, seems to us rather to preponderate. *Chicago & A. R. R. Co. v. Shannon, Adm'r*, 43 Ill. 338.

It is claimed that the refusal by the court to give the thirty-sixth, thirty-eighth and thirty-ninth instructions of plaintiff in error was error. These instructions announce the doctrine that it was the duty of the deceased to look and listen for the approaching train, and if he failed to do this, or take any means whatever to ascertain whether he could safely enter upon the track, then he could not recover. The rule laid down in these instructions amounts simply to this: the failure to look and listen for the approaching train is negligence *per se*. This view is not sustained by the authorities.

In the case of *Terre H. & I. R. R. Co. v. Voelker*, 129 Ill. 540, it is said: "It is doubtless a rule of law that a person approaching a railway crossing is bound in so doing to exercise such care, caution and circumspection to foresee danger and avoid injury as ordinary prudence would require, having in view all the known dangers of the situation; but precisely what such requirements would be must manifestly

differ with the ever-varying circumstances under which such approach may be made. Ordinarily, of course, the diligent use of the senses of sight and hearing is the most obvious and practicable means of avoiding injury in such cases, but occasions may and often do arise where the use of those senses would be unavailing or where their non-use may be excused. The view may be obstructed by intervening objects or by the darkness of the night. Other and louder noises, as is often the case in a city, may confuse the sense of hearing and render its use impracticable. The railway company, by its flagman or other agent or agency, may put the person off his guard and induce him to cross the track without resorting to the usual precautions. The duty may be more or less varied by the age, degree of intelligence and mental capacity of the party, and by a variety of other circumstances by which he may be surrounded. It follows that no invariable rule can be predicated upon the mere act of failing to look or listen, but a jury properly instructed as to the legal duty in respect to care and caution of a person approaching a railway crossing must draw from such act, in connection with all the attending circumstances, the proper conclusion as to whether he is guilty of negligence or not." In this case the learned justice who wrote the opinion cites, among many other authorities sustaining the view above taken, the case of *Plummer v. Eastern R. R. Co.*, 73 Me. 591, in which that court said it is held that the fact that a person, attempting to cross a railroad, does not at the instant of stepping on it, look to ascertain if a train is approaching, is not conclusive of a due want of care on his part.

In the case at bar, the noise of the outgoing train on the C. & A. track, and other and louder noises than that of plaintiff in error's train, and the fact that the deceased had his attention riveted on the man who was attempting to come on the C. & A. track and flagging him back lest he would suffer a serious injury or be killed, were excuses for the deceased for the non-use of his senses of sight and hearing. These instructions were properly refused.

It is contended it was error for the court to refuse instructions numbered twenty-one, twenty-two, twenty-seven, thirty-seven and forty-one asked by plaintiff in error. These instructions all relate to what presumption may be entertained by the employes of plaintiff in error with reference to a man crossing or going onto, or getting off a railroad track when a train is approaching. When the presumption obtains that a man will not go on, or will get off a railroad track in front of an approaching train, depends upon the circumstances surrounding the parties at the time of the accident. It does not exist as an abstract proposition of law. These instructions do not fall within the rule announced in the case of *Chicago, R. I. & P. R. R. Co. v. Austin*, 69 Ill. 426. In this case the attention of the jury by the instruction was called to the circumstances surrounding the parties at the time. If the instructions complained of had been given they could only have confused and misled the jury. They were therefore properly refused.

It is claimed that the court below erred in not giving plaintiff in error's nineteenth, twentieth and fortieth instructions.

These instructions are liable to the same criticism as plaintiff in error's refused instructions numbered thirty-six, thirty-eight and thirty-nine, and for the same reasons should have been refused.

The tenth and thirteenth instructions asked by plaintiff in error, it is contended, should have been given. What there is in these instructions as to the place being one of extraordinary danger where the collision took place, and the care and caution that should have been exercised by the deceased, were fully covered by other instructions given for plaintiff in error. In fact these were the only grounds these two instructions covered, and there is no reason why they should have been given.

The refusal to give plaintiff in error's refused instruction number twenty-three is assigned for error; substantially what is covered by this instruction was more clearly and fully stated in an instruction given for plaintiff in error.

It is contended the refusal of plaintiff in error's refused instruction number sixteen was error. This contention, we think, is not well taken. What there is in this instruction, well stated, is contained in plaintiff in error's fourth given instruction, and others given on behalf of plaintiff in error.

We have examined all the refused instructions to which our attention has been called by counsel for plaintiff in error in their brief, and as there are others contained in their assignment of errors to which no reference has been made, as to these, we take it, the assignment of error is waived.

Counsel for plaintiff in error assign for error the giving of defendant in error's first instruction, which is as follows:

"1. If the jury believe from the evidence in this case that at the time the deceased was struck by defendant's train, he was himself in the exercise of due care and caution for his own safety, and that the defendant was guilty of the negligence charged in the declaration, and that such negligence was the cause of the death of the deceased, then the plaintiff is entitled to recover in such sum as in your judgment the evidence warrants."

It is objected by plaintiff in error that this instruction places no limitation whatever on the damages which might be recovered.

We do not think this objection to the instruction complained of is tenable. The recovery was limited by the instruction to such sum as in their judgment was warranted by the evidence. The instruction was quite different from the one referred to by counsel in the case of *City of Chicago v. Scholten*, 75 Ill. 468. In that case the jury were told, in finding for plaintiff, they should assess the damages at such sum as will, in the judgment of the jury, compensate the plaintiff and those in whose interest he sues for the loss of the deceased.

In the case at bar, the jury are limited as to the amount warranted by the evidence. Even if this instruction were not accurately correct, the error is clearly cured by defendant in error's second instruction, in which the jury are told they are limited in assessing damages to such sum, if any-

thing, as the jury may deem a fair and just compensation with reference to the pecuniary injury, if any, resulting from such death, to the wife or next of kin of such deceased person. The amount of the judgment for the defendant in error, \$3,000, indicates there were no damages assessed for affliction or solace.

From a careful examination of the record in this case, we think the verdict of the jury is not the product of passion or prejudice, but that the damages assessed are fair and reasonable. Therefore the judgment of the Circuit Court is affirmed.

Henry Streuter et al. v. The Willow Creek Drainage District.

1. *RES JUDICATA*.—*The Doctrine Applies Only to Cases Where the Precise Question Involved was Previously Decided.*—Before a judgment or decree in one suit can operate as an estoppel in another suit, it must appear upon the face of the record, or be shown by extrinsic evidence that the precise question involved in the latter suit was raised and determined in the former.

2. *DRAINAGE*.—*Addition of Lands to Drainage District—Res Judicata.*—An order of a county court establishing a drainage district and fixing its boundaries is a final adjudication as to all the lands mentioned in the petition on which the order is granted, but does not bar future proceedings to add to such district other lands not included in the original petition.

3. *SAME*.—*Addition of Lands to Drainage District—Benefits.*—The object of the levee and drainage act is to reclaim lands from overflow, whether it comes from the natural lay of the land, or whether it is produced by back water, and if the work of a district protects lands from overflow, then they are directly benefited, and may be annexed and required to share in the burden imposed as well as in the benefits gained, and whether such lands were left out of the drainage district as originally organized, by mistake or accident, or whether the benefits were not or could not be anticipated is immaterial.

4. *SAME*.—*Addition of Land to Drainage District—How Secured.*—It is not necessary that the owners of lands sought to be annexed to a drainage district should take any action themselves, as the law provides that persons whose lands are benefited shall be deemed to have volun-

tarily made application to be included in such district, and directs how the commissioners shall proceed to have such lands included.

5. **APPEALS AND ERRORS**—*In Proceedings Under the Drainage Act.*—An appeal from an order of the County Court annexing lands to a drainage district is properly taken to the Circuit Court.

6. **COSTS**—*In Proceeding to Annex Lands to a Drainage District.*—The taxation of costs in proceedings to annex lands to a drainage district is a matter resting in the discretion of the court, and this court will not interfere with the exercise of such discretion unless there has been a plain and palpable abuse of it. And in this case the taxation of costs against the district is held not to authorize the interference of this court.

7. **SAME**—*Apportionment of.*—On an appeal by four persons from an order of a county court annexing certain lands to a drainage district, one of the appellants was successful, and judgment was entered against the district for one-fourth of the costs of the appeal. *Held*, that although the interest of such party in the suit may not have been as great as that of the other parties concerned, that as the costs were made jointly and as there were no data to determine what items of costs were made by each, the court was justified in entering judgment against the district for one-fourth of the costs.

Petition, asking to have certain lands annexed to a drainage district. Appeal from the Circuit Court of Morgan County; the Hon. CYRUS EPLER, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed December 2, 1897.

OWEN P. THOMPSON and CHARLES A. BARNES, attorneys for appellants.

MORRISON & WORTHINGTON, attorneys for appellee.

MR. JUSTICE GLENN DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Circuit Court of Morgan County adding certain lands of the appellants to the Willow Creek Drainage District.

The Willow Creek Drainage District was created by an order of the County Court of Morgan County on the 5th day of December, A. D. 1892, under what is known as the "Drainage and Levee Act." The lands included in such district were located in township 16 north, ranges 12 and 13 west of the 3d P. M. The lands involved in this controversy were not included in the petition filed asking to have this district organized, nor in the order establishing the

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same, nor were the owners' names mentioned. It was averred in the petition that the necessity of such drain was that the lands adjacent thereto and those benefited thereby were substantially useless without it; that the purpose of this drainage was the widening and deepening of Willow Creek, and of a lateral ditch running south from such creek, and of a lateral ditch running north from such creek, and the deepening and widening of such other lateral ditches as the commissioners of such proposed district might direct. This district comprised about 2,800 acres of low land between what is termed the Meredosia Bluffs and Meredosia Bay (a back water of the Illinois river near the town of Meredosia), that lies on both sides of Willow Creek. This district comprised all the lands that naturally drained toward and into Willow Creek.

The lands of appellants by this proceeding sought to be added to this drainage district are the east half of north east quarter of section eleven, which begins one-half mile north of Willow Creek, and the southwest quarter of the southwest quarter of section one, which lies one mile from the creek. Both these tracts belong to appellant Streuter, and the southeast quarter of section two, which lies directly west of the last named tract, and belongs to appellant Hillogg, and the northwest of the southwest of section one is directly northwest of the Streuter tract, and is owned by the appellant Webber. The most distant of these lands is only about one and one-fourth miles from the creek where it touches the section line between sections eleven and fourteen. As to all the land except a ridge on the west side of appellant Streuter's east half of northeast quarter of section eleven, there is a gradual and unobstructed fall from Willow Creek to and over appellant's lands. The surface of the ground on the bank of the creek is about three feet higher than the natural elevation of the ground at the corner of sections one, two, eleven and twelve, where the lands of appellants come together. The water sometimes flowed from Willow Creek to and over the lands of appellants two or more feet deep.

The commissioners of the Willow Creek Drainage District in February, 1894, commenced the work of deepening and widening Willow Creek, and connecting the lateral drains, and completed the same in June, 1894.

They dredged out Willow Creek by the use of a dredge boat for a distance of about four and one-half miles, and a depth of eight feet below the surface of the ground, and a width of twenty feet at the top and not less than ten feet at the bottom. The main lateral drains opened directly into Willow Creek, but certain of the smaller side drains had a trap constructed at the point where they entered the main channel, and when the creek was high the trap would close so the water would not run back on the lands, and as the water in the creek would run down the trap would open and allow the water on the inside to flow out. In the construction of this work the commissioners expended about \$9,000.

The Willow Creek Drainage District Company, by its commissioners, filed the petition in this case in the County Court of Morgan County in January, 1896, against the appellants and one Henry Kuhlman and others, under the provisions of Chap. 42, Sec. 58 of Hurd's Rev. Stat., to have certain lands annexed to the Willow Creek Drainage District that are owned by them lying outside of the present boundaries of such district; that such lands have been and will be benefited by the drainage work of such district, and in fact that such lands are now drained by the ditch constructed by said ditch.

The appellants and Henry Kuhlman, their co-defendant in this proceeding in the County Court, answered the petition, denying among other things that any of their lands were drained by the ditch of such drainage district, or that they will be benefited by the work of the district, and alleging that they had perfected a ditch of their own to drain their lands not connected with the Willow Creek Drainage District, and would receive no benefit by having their lands annexed to such district. Upon a hearing of the case in the County Court the prayer of the petition was granted

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and the appellants and Henry Kuhlman took the case to the Circuit Court of Morgan County by appeal.

Upon a hearing in that court the order of the County Court was affirmed except as to Henry Kuhlman; as to him the petition was dismissed and the lands of appellants were added to the district.

The appellants bring the case to this court by appeal.

The counsel for the respective parties concede there is no substantial disagreement as to the facts. The first contention on behalf of the appellants is, "That when the County Court entered its order establishing the Willow Creek Drainage District, and fixed the boundaries of the same, including all the lands that would be benefited thereby, such order became a final adjudication upon that question and no other lands can be added thereto."

In applying the rule of *res adjudicata*, which the appellants invoke in this case, in order that the decree of the County Court establishing the Willow Creek Drainage District should operate as an estoppel, it must appear upon the face of the record, or be shown by extrinsic evidence, that the precise question was raised and determined in that proceeding. *Sawyer v. Nelson*, 160 Ill. 629. These appellants were not parties to that proceeding or suit; the land mentioned and described therein as being benefited did not include their lands now sought to be added to the district.

In that proceeding one of the questions presented was, will the lands in the proposed district be benefited? In this proceeding it is, have the lands sought to be added to the district been benefited, and will they hereafter be benefited by the construction of the work of such district? The decree of the County Court settled the questions as to the lands being benefited that were mentioned therein, but not as to those not mentioned. There was no question raised as to whether these lands were benefited or not. The precise questions now raised as to the lands sought to be added to the district were not mooted then. *Russell v. Place*, 94 U. S. 606.

The second contention of appellants is that this case does

not fall within the clause of Sec. 58, Chap. 42, R. S., which provides that "any land lying outside the district as organized, the owner of which shall thereafter make connection with the main ditch or drain within the district as organized, or whose lands are or will be benefited by the work of such district, shall be deemed to have made voluntary application to be included in such district."

It is not claimed and the evidence does not show that the appellants ever made any connection with the main ditch or drain in the district as organized. The contention of the appellee is, that appellants are clearly within the clause of the statute which provides that those whose lands lie without the district as organized, and whose lands are or will be benefited by the work of such district, shall be deemed to have made voluntary application to be included in such drainage district.

Counsel for appellants in construing this statute makes a distinction between "direct" and "indirect" benefits, and contends, as the work of the drainage district only prevents the land of appellants from overflow, consequently the benefits are "indirect." This contention is not sustained by the statute nor is it sound in principle. The very object of the "Levee and Drainage Act" is to reclaim lands from overflow, whether it comes from the natural lay of the land, or whether it is produced by back-water. If the work of the district protects the lands of appellants from overflow, then they are benefited.

Prior to the organization of the Willow Creek Drainage District, Willow Creek was the drain for a large scope of country. It had become so filled up with drift and otherwise, that, at points, the bottom was higher than the natural surface of the ground, and in case of freshets, being a short stream, gathering the waters from bluffs, it would rise rapidly, and a large portion of the country was flooded, including the lands of appellants, which, at times, were overflowed two or more feet. Since the construction of the drains and ditches of the district, these lands of appellants are free from this overflow, and are benefited by

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the work of the district. These benefits are substantial, and the direct result of the work of the district.

If this case does not fall within that clause of Sec. 58 of Chap. 42 which provides for annexing lands lying outside the district organized, which are, or will be, benefited by the work of the district, then it would seem it could serve no useful purpose.

If the language of the statute is construed according to the ordinarily accepted meaning of the words used, its construction is free from difficulty. It is simply a provision to annex lands lying outside the district as organized that are or will be benefited by the work of such district. The limitations are first as to lands lying outside the district as organized, and second, as to the lands that are benefited by the work of the district. Whether they were left out by mistake or accident, or whether the benefits were not or could not be anticipated, is not material. The question is, are they, or will they be benefited; if so, then they should be annexed and share in bearing the burden imposed as well as in reaping the benefits gained. This seems to be the clear intent of the legislature.

It is suggested by counsel for appellants that the owners of lands to be annexed to a district already organized, ought voluntarily to do something themselves. That they should be the moving agent, and not the district. The legislature, however, anticipating that there might be some persons whose lands were benefited by the work of the district who would be willing to enjoy these benefits without sharing the burdens, and who would not care to become the voluntary moving agents to have their lands so benefited annexed to said district, provided that such persons whose lands were so benefited shall be deemed to have voluntarily made application to be included in such drainage district. The act then provides how the commissioners of the drainage district shall proceed to get the owners of the land so benefited into court, and have such lands included in such district. This provision of the statute clearly answers the objection suggested by appellant's counsel.

The first cross-error assigned by appellee is that the Circuit Court erred in overruling appellee's motion to dismiss the appeal of appellants from the County Court of Morgan County. This error is disposed of by the opinion of this court in the case of *Allman v. Lumsden*, 48 Ill. App. 17, in which it was held such appeal would lie.

The second cross-error assigned by appellee is that the Circuit Court erred when the court found for the defendant, Henry Kuhlman, in that court, and entered judgment against the appellee for one-fourth of the costs incurred in the Circuit Court in said cause.

The costs made by the defendants in the Circuit Court were made by them jointly. Under the issues the same witnesses were used by each, and although Kuhlman's interest in the suit may not have been as great as his co-defendants', that would not lessen his expenses in procuring the attendance of witnesses and other court expenses. Kuhlman was successful in the Circuit Court and was entitled to recover his costs, not only in the Circuit Court but in the County Court. He was wrongfully made a party. As the costs were made jointly, and there were no data to determine what items of cost were made by each, the court was justified in entering judgment for him for one-fourth of the costs, and we hold there was no error in entering a judgment for one-fourth of the costs incurred in the Circuit Court against appellee.

The third cross-error is the Circuit Court erred in rendering judgment against appellee for all the costs incurred in said cause in the County Court.

Upon the hearing of this cause in the County Court, when the proceeding was commenced, the court found all the lands sought to be included in the district are or would be benefited by the work of the district, and entered an order annexing them to the district as organized; of the defendants only the appellants and Henry Kuhlman brought the case to the Circuit Court by appeal.

A hearing on the appeal was had in the Circuit Court without the intervention of a jury, and the Circuit Court

found for Henry Kuhlman and dismissed the proceeding as to him, and for his lands mentioned in the petition, and affirmed the order of the County Court as to appellants and their land. This was in effect a partial affirmance of the order of the County Court.

The taxation of costs in this proceeding was a matter resting in the discretion of the Circuit Court, and this court will not interfere with the exercise of such discretion unless there has been a plain and palpable abuse of it. *Lovell v. Sny. I. L. Drainage District*, 159 Ill. 188; *Spear v. Drainage Com'rs*, 113 Ill. 632; *Lee v. Quirk*, 20 Ill. 392. We do not think there has been such an abuse of this discretion by the Circuit Court that would authorize us to interfere with it.

The order of the Circuit Court is affirmed.

**People, etc., ex rel., etc., v. Mutual Life Insurance Co.
and Chas. Ryan.**

1. **PLEADING—*Under Penal Statutes.***—To authorize a recovery under a highly penal statute, the averments of the declaration must bring the case clearly within the prohibition of the statute, and it must be strictly construed. Every fact necessary to constitute the offense for which the recovery of the penalty is sought, must be averred, and no intendments are allowed in favor of the party for whose benefit the suit is brought.

2. **INSURANCE—*An Application for, is Not a Contract.***—An application for insurance is not a contract. The policy, with all its terms and conditions, with the application as a part of it, constitute the contract of insurance, and until the policy of insurance is issued there is no contract.

3. **SAME—*Act of 1891 to Prevent Unjust Discriminations, Construed.***—An averment that an insurance company sold and offered to deliver an insurance contract at a rate of premium at variance with the regular established rate, does not charge a violation of the act of 1891, to prevent unjust discriminations of and by life insurance companies. The act is not leveled at an offer to effect the prohibited insurance, but the prohibited insurance must have been effected.

4. **PROPOSITIONS OF LAW—*Must Not Call for Conclusions on Questions of Fact.***—This court holds that the propositions of law submitted by appellants were properly refused, as they simply called for the opinion of the court on questions of fact.

Debt, for a penalty. Appeal from the Circuit Court of Morgan County; the Hon. CYRUS EPLER, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed December 2, 1897.

J. MARSHALL MILLER, state's attorney, GEORGE W. SMITH and WILLIAM N. HAIRGROVE, attorneys for appellant.

WINSTON & MEAGHER, attorneys for appellee, The Mutual Life Insurance Co.; MORRISON & WORTHINGTON, of counsel.

When a so-called proposition of law is submitted to the court which is in reality a question of fact, or which calls for the opinion of the court upon a question of fact, it is properly refused. *County of La Salle v. Milligan*, 143 Ill. 321 (346); *Alexander v. Alexander*, 52 Ill. App. 195 (199); *Knowles v. Knowles*, 128 Ill. 110 (115); *O'Bannon v. Vigus*, 32 Ill. App. 473 (500).

Where a party desires to avail himself of the refusal of the trial court to admit certain exhibits as evidence in the case, the exhibits in question must be attached to and made a part of the bill of exceptions. *Clifford v. Drake*, 14 Ill. App. 75; *Same v. Same*, 110 Ill. 135; *McLaughlin v. Walsh*, 3 Scam. 185; *McBain v. Enloe*, 13 Ill. 76; *Warner v. Manski*, 17 Ill. 234; *Deem v. Crume*, 46 Ill. 69 (75); *Stack v. The People*, 80 Ill. 32.

A contract of insurance is not complete until the minds of both parties meet. Making an application does not make a contract. *Covenant Mutual Benefit Ass'n v. Conway*, 10 Ill. App. 348 (353); *People's Ins. Co. v. Paddon et al.*, 8 Ill. App. 447 (450); *Bloomington Mut. Life B. Ass'n v. Cummins*, 53 Ill. App. 530.

It is a well settled rule of law that, in actions to recover a penalty under a penal statute, the averments of the declaration must bring the case clearly within the prohibition, and that the provisions of the statute must be strictly construed. The declaration in such a case is to be construed most strongly against the pleader, and every fact necessary to constitute the offense for which the penalty is sought to be recovered must be distinctly averred, and no intendments will be allowed in favor of the prosecution. *People v. Fessler*, 145 Ill. 150 (155), and cases there cited.

The object of a penal statute is to punish a wrongdoer, as well as to recompense the injured individual. To subject any one, therefore, to the penalty for the act it must be shown to have been willfully violated, by proof that the party committed the forbidden act himself or caused another to do it by his act or authority.

The liability arising from the relation of master and servant is founded in policy, but implication of authority in the servant that will render the master liable, in a civil suit, will not be sufficient to convict him in a criminal or penal prosecution. *Cushing v. Dill*, 2 Scam. 460; *Satterfield v. Western Union Tel. Co.*, 23 Ill. App. 446; *City of Chicago v. Rumpff*, 45 Ill. 90 (99); *Whitecraft v. Vanderver*, 12 Ill. 235; *Goodwin v. Bishop*, 145 Ill. 421 (426).

MR. JUSTICE GLENN DELIVERED THE OPINION OF THE COURT.

This was an action in debt to recover a penalty under an act of the legislature to correct certain abuses and prevent unjust discriminations of and by life insurance companies doing business in this State, between insurants of the same class and equal expectation of life, etc. The declaration contained three counts. To the first count the Mutual Life Ins. Co. of New York demurred. The court sustained the demurrer and appellants stood by this count.

There is a copy of the act under which this suit is brought set out in this count which is as follows:

Comes now the plaintiff in the above entitled cause by Felix D. McAvoy, state's attorney, and complains of the defendants in debt, the Mutual Life Insurance Company of New York, doing business in the State of Illinois, and Charles Ryan, agent of same, of a plea that they render unto the plaintiff the sum of one thousand (\$1,000) dollars which they owe to the plaintiff and unjustly detain from the plaintiff, for that the General Assembly of the State of Illinois, at Springfield, Illinois, passed an act approved on the 19th day of June, 1891, and in force July 1, 1891, entitled "An act to correct certain abuses and prevent unjust discriminations of and by life insurance companies doing business

in this State between insurants of the same class and equal expectation of life in the rates, amount or payment of premiums, dividends, rebates or other benefits." The above entitled act is as follows:

Sec. 1. Be it enacted by the people of the State of Illinois represented in the general assembly, that no life insurance company or association organized under the laws of the State or doing business within the limits of the same, shall make or permit any discrimination between insurants of the same class, and equal expectation of life in its established rates, nor in charging, collecting, demanding, or receiving of the amount of premiums for insurants of the same class and equal expectation of life, nor in the return, ratable, of premiums, dividends, or other benefits accruing or that may accrue to such insurants aforesaid, nor in the terms and conditions of the contract between the insurants and such company, and such contract of insurance shall be wholly expressed and contained in the policy issued and the application therefor. Nor shall any such company nor its agents pay or offer to pay, or allow any person insured any special rebate of premium, or any special favor or advantage in the dividends or other benefits to accrue on such policy, or promise to give any advantage or valuable consideration whatever not expressed or specified in the policy of such company.

Sec. 2. If any life insurance company or association or its agent or agents aforesaid, shall make any unjust discrimination as enumerated in section 1 of this act, the same shall be deemed guilty of having violated the provisions of this act, and upon conviction thereof shall be dealt with as hereafter provided.

Sec. 3. Any life insurance company or association which shall transact its business in this State in violation of the provisions of this act, shall, together with the agent or agents so unlawfully transacting said business jointly and severally, be subject to a penalty of not less than five hundred dollars, or more than one thousand dollars, to be sued for in the name of the people of the State of Illinois, by the state's attorney of the county in which such agent or agents

reside, or in the county where the offense was committed. One-half of said penalty when recovered shall be paid into the treasury of said county, the other half to the informer of such violation, and it is hereby made the duty of the auditor of public accounts upon conviction had as aforesaid, or penalty recovered against any such company, or the agent thereof for any violation of this act, at once to revoke, cancel and annul the certificate of authority issued to any such agent by the auditor of public accounts.

Sec. 4. The provisions of this act shall not apply to fraternal associations dispensing aid or benefits to members or their heirs or legal representatives.

On and prior to the 13th day of September, 1894, the Mutual Life Insurance Company, a corporation doing business as such in the State of Illinois, and having as its authorized agent for the purpose of carrying on its business of life insurance in the State of Illinois, Charles Ryan; and Charles Ryan and the Mutual Life Insurance Company of New York, were on the 13th day of September, 1894, authorized to do business in the State of Illinois, the said company as a life insurance company, and the said Charles Ryan as the agent of said company; the said company, having complied with the laws of the State of Illinois was authorized to carry on its business, and Charles Ryan having the proper certificate of authority from the State authorities to act as the agent for the said company. William N. Hairgrove was, in 1894, a citizen of the State of Illinois, and had been for a long time prior to 1894, and was, and is entitled to the benefit of the laws of the State of Illinois. On the 13th day of September, 1894, the Mutual Life Insurance Company of New York, by Charles Ryan, its authorized agent, sold, and offered to deliver to J. Harry Barto a contract of insurance with said company on the life of J. Harry Barto, at Waverly, Morgan county, Illinois, and said insurance contract was sold at a rate of premium at variance with the regular established rate for insurants of the same class and equal expectation of life in the Mutual Life Insurance Company of New York; and J. Harry Barto paid for the said insurance, which was

in the sum of five thousand dollars, one hundred dollars as the first full annual premium; and the regular rate for insurance of the same class and equal expectation of life in the said company was one hundred and forty dollars and fifty cents; said insurance was only contingent upon a satisfactory medical examination, and J. Harry Barto was examined by a medical examiner of the said company, and passed a satisfactory examination, and the said authorized agent of the said company gave to J. Harry Barto a receipt for the full premium of one hundred dollars and fifty cents, having received therefor only J. Harry Barto's negotiable obligation for one hundred and forty dollars, and thus the Mutual Life Insurance Company of New York and Charles Ryan violated the statutes of the State of Illinois by rebating and giving a special benefit to J. Harry Barto over insureds of the same class and equal expectation of life, and thereby became indebted to the people of the State of Illinois in the sum of one thousand dollars for the use of the said people as well as the informant, William N. Hairgrove; and therefore they sue, etc., by F. D. McAvoy, state's attorney.

It will be observed from this act that it is highly penal. In case any life insurance company shall transact its business in violation of the provisions of this act, the company and its agent or agents shall be jointly and severally liable for a penalty of not less than five hundred dollars, nor more than one thousand dollars, and upon the recovery of the judgment for such penalty, it is made the duty of the auditor of public accounts to annul and cancel the certificate of authority issued to the agent transacting such business by the auditor of public accounts. To authorize a recovery in this class of actions, it is well settled that the averments of the declaration must bring the case clearly within the prohibition of the statute, and that it must be strictly construed. Every fact necessary to constitute the offense for which the recovery of the penalty is sought, must be averred, and no intendments are allowed in favor of the party for whose benefit the suit is brought. *The People v. Fesler*, 145 Ill. 150 and cases cited.

The application alone for insurance is not the contract. The policy, with all its terms and conditions, with the application as a part of it, constitute the contract of insurance. Until the policy of insurance is issued there is no contract of insurance. *Bloomington Mutual Life Benefit Association v. Cummins*, 53 Ill. App. 530; *Covenant Mut. Ben. Ass'n v. Conway*, 10 Ill. App. 348.

The averment in the first count of the declaration charges that appellee by its agent sold and offered to deliver to J. Harry Barto at Waverly, Morgan county, Illinois, an insurance contract, at a rate of premium at variance with the regular established rate for insurants of the same class and equal expectation of life, in the Mutual Life Insurance Company of New York.

We do not think this averment is sufficient to enable appellants to recover the penalty provided by this act. The penalty can only be recovered when the insurance has been effected, when the contract has been executed, and is no longer executory. While simply executory no offense is committed. It is not sufficient that there was a sale and offer to deliver. There must have been a delivery. The act is not leveled at an offer to effect the prohibited insurance, but the prohibited insurance must have been effected. The averments in the first count of the declaration do not clearly bring the case within the prohibition of the act. There is no averment that the policy was ever issued. The act provides that the contract of insurance shall be wholly expressed and contained in the policy and the application therefor, showing clearly that it was the intention of the framers of the act that the policy should be delivered, and the legal effect averred, so the court could determine whether the case was clearly within the prohibition of the act. We think the ruling of the court below in sustaining the demurrer was correct.

The case was tried on its merits on the second and third counts by the court, without the intervention of a jury. The counts were substantially the same. On both it was averred that appellee, by Charles Ryan, its authorized agent

at Waverly, Morgan county, Illinois, sold and delivered to J. Harry Barto a contract of insurance on the life of J. Harry Barto with the Mutual Life Insurance Company of New York; that the premium paid on such contract of insurance by J. Harry Barto was at variance with the rate charged other insurants of the same class and equal expectation of life with said Barto. Every fact necessary to constitute the offense, for which the recovery of the penalty is sought, must be distinctly averred and clearly proved. No intendment can be indulged in in favor of the appellants.

Even if the intendment is allowed that by the averment appellee, by its agent, sold and delivered a contract of insurance to J. Harry Barto, that it is meant a policy of insurance was delivered to him, the proof falls far short of establishing this fact. The evidence is of a very unsatisfactory character with reference as to whether there had been a delivery of the policy or not. It consisted of the contents of lost letters, written by persons claimed by appellant to be the agents of appellee, and loose admissions made by them with reference to the issuance of the policy, with but a slight degree of accuracy or certainty as to what the contents of the letters or what the admissions were.

The averments in these two counts charging a delivery of the policy of insurance, evidently means there was a manual delivery of it to Barto. This the proof fails to clearly establish. No one testified to having seen the policy or of knowing what its contents were. The proof having failed to clearly establish the facts necessary to constitute the offense charged in the declaration, the court was justified in finding for appellee and entering judgment on the finding.

The refusal by the court to give the propositions of law submitted to be held or refused by the appellants, is assigned as error. In this there was no error. They simply called for the opinion of the court on questions of fact, and were properly refused.

The judgment of the Circuit Court is affirmed.

James F. Leggett v. Illinois Central R. R. Co.

1. **TRIALS—Amount of Proof Required in Civil Cases.**—In civil cases juries are required to decide upon the preponderance of the evidence and this, too, when the proof does not show the existence of the facts in question to the satisfaction of the jury, or they may have reasonable doubts as to the real truth; and an instruction that the evidence must show the necessary facts with reasonable certainty is erroneous.

2. **RAILROADS—Fences—Proof as to Point of Access to Right of Way.**—In a suit against a railroad company to recover the value of a horse alleged to have strayed upon the right of way of the company through an insufficient fence, an instruction requiring the plaintiff to prove "where the horse actually did get upon the right of way" is improper.

3. **FENCES—Rule as to Sufficiency of.**—A fence that will turn ordinary stock, or stock not extraordinarily breachy, is a good and sufficient fence.

4. **EVIDENCE—Of Events Happening After an Accident.**—In a suit for damages, based on the insufficiency of a fence, evidence that the fence was removed shortly after the happening of the accident complained of is not admissible.

Trespass on the Case, for killing a horse. Appeal from the County Court of De Witt County; the Hon. GEORGE K. INGHAM, Judge, presiding. Heard in this court at the May term, 1897. Reversed and remanded. Opinion filed December 2, 1897.

CHAS. R. ADAIR and E. J. SWEENEY, attorneys for appellant.

A sufficient fence is one that will not only turn ordinary stock, but stock somewhat unruly. *Chicago & A. R. R. Co. v. Utley*, 38 Ill. 411.

The presumption is that a sufficient fence would have turned a horse that was somewhat unruly; therefore the burden is upon the defendant to show that the animal was breachy if the defendant insists, as a defense, that the fence was sufficient. *Missouri Pacific Ry. Co. v. Bradshaw*, 33 Kas. 533; *Thornton on Railroad Fences*, Par. 239.

A plaintiff should be permitted to show that a railroad right of way fence was removed shortly after the accident, and a new one built in its stead, as showing the condition of such old fence.

In a civil cause it is error to instruct that a party must prove to the satisfaction of the jury, etc. The law does not require such a high degree of proof for the maintenance of an issue in a civil cause. *Ruff v. Jarrett*, 94 Ill. 475; *Herrick v. Gary*, 83 Ill. 85; *Graves et al. v. Colwell*, 90 Ill. 612; *Protection Life Ins. Co. v. Dill et al.*, 91 Ill. 174; *Stratton v. Central City Horse Ry. Co.*, 95 Ill. 25; *Gooch v. Tobias*, 29 Ill. App. 268; *Balohradsky v. Carlisle et al.*, 14 Ill. App. 289; *Connelly v. Sullivan*, 50 Ill. App. 627; *Mitchell v. Hindman*, 47 Ill. App. 431.

If it is error to instruct that a party must prove to the "satisfaction" of the jury, etc., then it is error to instruct the jury that "unless you can say upon your oaths," etc., for the latter is much stronger than the former.

MOORE, WARNER & LEMON, attorneys for appellee; JAMES FENTRESS and C. V. GWIN, of counsel.

It was not error for the court to refuse to permit the appellant to prove that several months after the accident the railroad company removed the old board fence and erected a new one. *Hodges v. Percival*, 132 Ill. 53; *The Village of Warren v. Wright*, 103 Ill. 298.

MR. JUSTICE GLENN DELIVERED THE OPINION OF THE COURT.

This is an action on the case brought by appellant against appellee in the County Court of DeWitt County to recover the value of a horse that strayed upon the right of way of appellee, through an insufficient fence, and was killed by the train of appellee. The case was tried by a jury that found for the appellee. Judgment was rendered upon the verdict for appellee for costs, and the case brought by appeal by appellant to this court.

There was a close conflict in the evidence. But as the case must be reversed on account of erroneous instructions given by the court on behalf of appellee, we will refrain from a discussion of the evidence with reference to whom the merits of this case rest.

One of the errors assigned on the record is that the court

below erred in overruling appellant's motion for a new trial, and one of his reasons for a new trial is that the court gave improper instructions on behalf of appellee. The appellant was bound to make out his case by a preponderance of the evidence; a bare preponderance is sufficient, though the scales drop but a feather's weight in his favor.

A very different rule was adopted by the court below in this case. The court told the jury in the second, eighth and thirteenth instructions given for appellee, that "if the proof fails to show with reasonable certainty at what place the animal got on the right of way, then your verdict should be for the defendant;" and "if, after considering all the evidence together, they are unable to say, with reasonable certainty, whether the animal in entering the right of way went through a sufficient or insufficient fence, then the jury should find the defendant not guilty;" and also "if you are unable to tell from the evidence with reasonable certainty whether the horse got on to the right of way through the fence or some other fence, * * * then it would become the duty of the jury to find the defendant not guilty." The rule announced in these instructions does not apply to a civil case. To establish a fact to a reasonable certainty requires that degree of proof of certainty which the jurors would be willing to act upon in their own grave and important concerns; that is, the degree of proof should be such that the fact is established beyond a reasonable doubt. "A reasonable doubt" and "reasonable certainty" and "moral certainty" mean one and the same thing. 3 Greenleaf on Evidence, Sec. 29, n. 2; Commonwealth v. Webster, 5 Cush. 320.

The degree of proof required to enable the appellant to recover, as announced in appellee's fourth and first modified instructions given, is not warranted by the law. In these instructions the court told the jury that "Unless you can say, upon your oaths, where the horse got upon the right of way of the appellee, and that at that place the railroad company was guilty of negligence, your verdict must be for the defendant." The language used in these instruc-

tions is such that it would lead the ordinary man to believe, before he could find a verdict he must be satisfied as to where the horse got upon the right of way of appellee, and that at that place appellee was guilty of negligence; he must be so well persuaded of the existence of these facts from the evidence that he would under oath say they existed. This is requiring a higher degree of proof than is required to establish the existence of a fact beyond a reasonable doubt.

In civil cases juries are required to decide facts upon the preponderance or weight of the evidence, and this too when the proof does not show the existence of the fact in question to the satisfaction of the jury, or they may have reasonable doubts as to the real truth. *Stratton v. Cent. City Horse Ry. Co.*, 95 Ill. 25.

There is quite a line of decisions of the Supreme and Appellate Courts of this State holding when the jury have been instructed, that before they can find for the plaintiff, he must show by the evidence in the case, "to the satisfaction of the jury;" "that the jury must be satisfied by a preponderance of the evidence;" "unless the jury are convinced by a preponderance of the evidence;" and "facts must be established by satisfactory evidence;" that the degree of proof required under these instructions is greater than is required by the law, and the instructions should not have been given. *Herrick v. Gary*, 83 Ill. 85; *Graves v. Colwell*, 90 Ill. 612; *Protection Life Ins. Co. v. Dill*, 91 Ill. 174; *Ruff v. Jarrett*, 94 Ill. 475; *Stratton v. Cent. City Horse Ry. Co.*, *supra*; *Brent v. Brent*, 14 Ill. App. 256; *Gooch v. Tobias*, 29 Ill. App. 268; *Connelly v. Sullivan*, 50 Ill. App. 627; *Mitchell v. Hindman*, 47 Ill. App. 431. The degree of proof required in the foregoing cases is not nearly so great as that adopted by the court below in the case at bar. The fifth instruction given on behalf of the appellee is erroneous. In this instruction the jury are directed that under the law the plaintiff is bound to prove by a preponderance of the evidence where the horse actually did get upon the right of way. This instruction requires that degree of proof as to the place where the horse got on the right of way, that there could be no doubt as to the place.

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The court below in the second instruction given for appellant, and the ninth and twelfth, and also in the second modified instruction given for appellee, attempted to announce the rule as to what was a good and sufficient fence, but did not state it accurately. We would not for this reason reverse the judgment. The rule as now settled by the Supreme and Appellate Courts of this State is, that a fence that will turn "ordinary" stock, or stock "not ordinarily breachy," is a good and sufficient fence. *Chicago & A. R. R. Co. v. Utley*, 38 Ill. 410; *Scott v. Wirshing*, 64 Ill. 102; *Scott v. Buck*, 85 Ill. 334; *Albright v. Bruner*, 14 Ill. App. 319.

The appellant offered to prove on the trial of this case in the court below by the witness, John Jordan, that the fence between Rilley's pasture and the right of way of the railroad was removed shortly after the accident, and that during the fall after the horse was killed he hauled the old fence away. The horse was killed on the night of August 19, 1895. This the court refused to allow him to do. In this ruling there was no error. *Hodges v. Percival*, 132 Ill. 53; *Village of Warren v. Wright*, 103 Ill. 302.

For the errors above indicated the judgment of the court below is reversed and the cause remanded.

Stephen L. Roley v. Louisa Crabtree.

1. **LANDLORD AND TENANT**—*Tenant Holding Over—Terms of Original Lease Continued.*—Where there is a leasing for a definite time, and the tenant holds over without notice to quit, he holds on the same terms as are provided in the original contract, unless something is shown indicating a change in the covenants of the lease.

Transcript, from a justice of the peace. Appeal from the Circuit Court of Edgar County; the Hon. FERDINAND BOOKWALTER, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed December 2, 1897.

GEO. A. VAN DYKE, attorney for appellant.

DUNDAS & O'HAIR, attorneys for appellee.

MR. JUSTICE GLENN DELIVERED THE OPINION OF THE COURT.

This suit was commenced before a justice of the peace of Edgar county, by appellant, to recover of appellee \$7.50, one month's rent, for certain apartments rented by him to appellee. Upon a trial in that court, judgment was rendered by the justice in favor of appellant for \$7.50. From this judgment an appeal was prosecuted to the Circuit Court of Edgar County by appellee. In that court the case was tried by the court with a jury and the finding was for appellee, and judgment was rendered on the finding by the court for her costs in that behalf expended. The case is brought to this court by appeal to reverse this judgment.

It is conceded by the parties that the appellant rented to appellee certain apartments of his in the second story of a building of his, in the city of Paris, in the State of Illinois, consisting of three rooms, by the month, at a rental of \$7.50 per month, without fixing the time that such lease should terminate. It is, however, contended on the part of appellee that appellant agreed at the time of such leasing that he would keep the premises in good repair.

Appellee went into possession of the premises under such leasing October 1, 1891, and continued to occupy the same and pay the rent on the first day of each month, until the first day of July, 1896, at about which time appellant gave her notice that he had determined to terminate the lease, and for her to turn over the property to him. She did not surrender the possession of the premises until the middle of July. This suit is brought to recover the rent for the month of July, 1896. From the record it appears that the appellee testified upon the trial of this case in the Circuit Court, that at the time of making the contract of leasing, that appellant agreed to keep the premises in good repair, and that appellant testified he did not agree to keep them in repair. Their testimony was the only testimony there was upon this subject. It then became the duty and province of the jury to determine which of the parties was cor-

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rect, or whose testimony was entitled to the greater weight. This the jury have done. The fact that appellant had such premises repaired and paid for having it done, is a circumstance corroborating appellee's version of this controversy.

It is a well settled rule that a landlord is not bound to make repairs, unless he has expressly agreed to do so in his contract of leasing. This, the jury found by their verdict, he did, and we think their finding is sustained by the evidence.

It is contended by appellant's counsel in cases where there is a renting for a definite period, and the tenant holds over, the only covenants of the lease revived thereby, are those relating to the amount of the rent and the time when to be paid. This claim is not sustained by the authorities cited by counsel. The rule is, where there is a leasing for a definite time, and the tenant holds over without notice to quit, it is on the same terms as the original leasing. It is with the implied consent of the lessor, and impliedly under the same covenants, unless something is shown indicating a change in the covenants of the lease.

Even if the law were as contended by appellant's counsel, it would not affect this case. Here there was no holding over after notice of the termination of the lease or to quit. The leasing in this case was by the month, by the special agreement of the parties, and the landlord could not terminate the tenancy without giving thirty days' notice in writing. This was not done.

It appears from the evidence that at the time of the making of the lease, appellant agreed to keep the premises in good repair. This he failed to do, and in consequence thereof, the roof leaked and the water loosened the plastering, and it fell upon appellee's household furniture and injured the same. In the court below she sought to recoup these damages as to the \$7.50 rent, claimed by the appellant, as due for the month of July, 1896. The jury allowed this claim, and in doing so we think they were justified by the evidence.

The judgment of the court below is affirmed.

Wm. T. Brown et al., Ex'rs, v. Auburn State Bank et al.

1. **REAL ESTATE**—*Failure to Give Township and Range in Describing.*—A description of land as in a certain section without naming the township and range does not render the description void for uncertainty. The fact that there are many sections by the same number is a latent ambiguity, which is only shown to exist by evidence outside the description, and being a latent ambiguity, is susceptible of explanation by parol testimony.

Petition, in probate. Appeal from the Circuit Court of Macoupin County; the Hon. ROBERT B. SHIRLEY, Judge, presiding. Heard in this court at the May term, 1897. Reversed and remanded with directions. Opinion filed December 2, 1897.

RINAKER & RINAKER, attorneys for appellants.

PEEBLES, KEEFE & PEEBLES, attorneys for appellees.

"Whenever an attempt is made to convey lands, and the description employed is such that it appears from itself that the premises can not be found and identified, it must be regarded as void." *Carter v. Barnes*, 26 Ill. 454.

If this is true of a conveyance of lands, it is also true of an inventory, which, as far as these appellants are concerned, operates the same as a conveyance to save their decedents' land from after-allowed claims.

"When it is said in a deed that the grantor conveys a quarter section of land situated in a county and township named, this is the general description, but if taken alone it passes nothing, because there are many tracts within the boundaries named that would fully answer the description, and not being distinguished from these other tracts, it could not be located, and nothing would pass by the deed." *St. Louis Bridge Co. v. Curtis*, 103 Ill. 416.

"If neither the description as a whole, or any part of it, renders it certain what object was intended, we can affix no meaning to the words employed, and the deed or clause is void for the uncertainty." *Elphinstone on Int. of Deeds*, 115, Rule 28.

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"If the words of a document are so defective or ambiguous as to be unmeaning, no evidence can be given to show what the author of the document intended to say." Am. & Enc. of Law, Vol. 7, 93.

MR. JUSTICE GLENN DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Circuit Court of Macoupin County, Illinois, which finds that certain lands belonging to the estate of one George S. Brown, deceased, were not inventoried or accounted for by the executors of his will, and that said lands are liable to be converted into money to pay the claims of the appellees, who filed their demands against the estate of said George S. Brown more than two years after the issuance of letters testamentary. The facts are as follows: George S. Brown died testate in Macoupin county on the 30th day of November, A. D. 1893. Letters testamentary were issued to the appellants as executors of his will on December 30, 1893. An inventory purporting to list all of the property of the estate was filed by them, bearing date January 17, 1894.

They made their first report of their acts and doings as such executors to the County Court of said county on December 30, 1895, and subsequent to that date, after the publication of a final settlement notice, they filed a second report on the 24th day of March, 1896. Prior to the filing of this last report, but after two years had elapsed from the date of the issuance of letters testamentary to the appellants, these appellees filed claims against the estate of George S. Brown, which claims were founded upon promissory notes signed by him in his lifetime. The appellants pleaded the two-year statute of limitations provided in the administration act as a bar to the allowance of the claims, and their payment out of property before that time inventoried or accounted for by them. The County Court allowed the claims, but required that they should be paid out of assets of the estate of George S. Brown not previously inventoried or accounted for.

The inventory filed by the executors described a large quantity of real estate consisting of town lots in Modesto,

Ill., some farm lands, and also a business house in Jacksonville, Ill. The method of arranging and describing the real estate in the inventory was a little unusual. The scrivener grouped certain town lots together and marked them Division No. 1; certain other town lots, similarly grouped, were Divisions Nos. 2, 3, 4, etc.; then certain lands were described together and marked Nos. 5, 6 and so on down to the conclusion of the description of the real estate.

All of the real property in each of these divisions is fully, carefully and properly described except in Division No. 7. Division No. 7 describes $67\frac{1}{2}$ acres of land as situated in sections Nos. 22 and 23, without any reference to any township or range, county or State, and absolutely without any link to connect it with any subsequent or preceding division, or any words to show anything with reference to the location of the land, except that it is in certain sections named in the description.

The land involved in this controversy is described in the inventory filed by the executors as follows:

"No. 7. The west one-half of the north one-half of the southeast one-fourth of southwest one-fourth of section 23. Also the northwest one-fourth of the northeast one-fourth and $17\frac{1}{2}$ acres off the east side of the northeast one-fourth of the northwest one-fourth of section 22."

It is contended by the appellee that this description is void for uncertainty, as it specifies neither township, range, meridian, county nor State. It can not be said by looking at the description in the inventory alone that it is void for uncertainty. It does describe the premises as certainly and accurately as if they had been described as "Black Acre," which is held to be a good and certain description. But if we look outside of the description in the inventory, and examine the acts of Congress, and the public surveys of the State, we see there is an ambiguity in the description, which, unexplained, leaves it entirely uncertain, because it does not refer to any township, range or meridian. We find there are as many sections twenty-two and twenty-three as there are congressional townships in the State. This is a latent ambiguity, which is only shown to exist by evidence outside

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the description in the inventory. It being a latent ambiguity is susceptible of explanation by parol testimony. The ambiguity in this case arises from the fact that there are several sections twenty-two and twenty-three in this State. *Dougherty v. Purdy*, 18 Ill. 206; *Bybee v. Hageman*, 66 Ill. 519; *Mason v. Merrill et al.*, 129 Ill. 503; *St. Louis Bridge Co. v. Curtis et al.*, 103 Ill. 410, 416; *Billings v. Kankakee Coal Co.*, 67 Ill. 489; *Allen v. Bowen et al.*, 105 Ill. 361; *Clark v. Powers*, 45 Ill. 283; *Colcord v. Alexander*, 67 Ill. 581; *Atwater v. Schenck*, 9 Wis. 160. As it appears from the evidence, the testator at the time of his death was the owner of the north one-half of north half of the southeast one-fourth of the southwest one-fourth of section 23, also the northwest one-fourth of the northeast one-fourth and $17\frac{1}{4}$ acres off the east side of the northeast one-fourth of northwest one-fourth of section 22, in township number 12, north of range 8, west of the 3d principal meridian, in Macoupin county, State of Illinois; that he acquired title to it from one McPherson, May 3, 1886, that he was in possession at the time of his death and had been since the purchase of it; and that he owned no land in any other township, except township 12 north, range 8, west of the 3d principal meridian. From these facts and circumstances it seems clear the land intended to be inventoried by the executors, the appellants, was that described as in sections 22 and 23, in township 12 north, of range 8, west of the third principal meridian, in said Macoupin county.

As the testator resided in Macoupin county, Illinois, the presumption will be indulged in by the court, that the lands referred to are situated in Macoupin county and in this State, until the contrary appears. There can be no doubt under the cases above cited as to the sufficiency of this proof to remove the latent ambiguity. From the view we have taken of this case, we deem it unnecessary to discuss the question whether there has been such an accounting by the executors of the lands in controversy, that will relieve them from being liable to the payment of appellee's claims.

The decree of the court below is reversed and the cause remanded with instructions to dismiss the petition.

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182s 215**Henry C. Dickerson v. Mayor and Aldermen of the City of Le Roy.**

1. CITIES AND VILLAGES—*Application of the Statute of Limitations and the Doctrine of Equitable Estoppel.*—The statute of limitations does not run in favor of an individual and against a municipality holding a street for the general public, but the doctrine of equitable estoppel from abandonment or non-user may be invoked.

2. ESTOPPEL—*Where City Has Allowed Private Person to Use Street.*—Where municipal authorities consented to the erection of structures in a public street and acquiesced in their remaining there for twenty-four years, and where the owners of such structures were induced to believe that they would not be interfered with by the public authorities, and so believing expended a large sum of money on such structures, the court holds that under the circumstances it would not be equitable or just to order such structures removed, and that the doctrine of equitable estoppel applies.

Mandamus.—Appeal from the Circuit Court of McLean County; the Hon. THOS. F. TIPTON, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed December 2, 1897.

OWEN T. REEVES and H. G. REEVES, attorney for appellant.

It is *prima facie* the duty of the mayor and city council, in a city where, by law, they are given power over streets, to keep the streets free from obstructions. *City of Bloomington v. Bay*, 42 Ill. 503. The city of Le Roy, incorporated under the general law, has power over the streets, and is required "To prevent and remove encroachments or obstructions upon the same." *Hurd's Statutes* 1895, 265, clause 10.

This power having been given the city council, and the general law providing that the mayor shall preside at its meetings, and in case of a tie, shall give the casting vote, the writ was properly directed to the mayor and city council in their official capacity, instead of the city of Le Roy, requiring them to do the particular thing specified in the writ, which appertains to their office and duty. **Man-**

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damus was an appropriate remedy. *People ex rel. v. City of Bloomington*, 63 Ill. 207; *Chicago & A. R. R. Co. v. Suffern*, 129 Ill. 274.

City authorities can not appropriate a street, so a sidewalk can not be laid down upon or adjoining the boundary line of the street. *Carter v. City of Chicago*, 57 Ill. 283.

A village can not use a "square" dedicated to the use of the citizens generally, as a site for a town or village hall. *Village of Princeville v. Auten*, 77 Ill. 325.

Although a city holds the fee to its streets, yet it is in trust for the use of the public for the legitimate purpose of a street. It has no power to sell or lease or otherwise appropriate it to other purposes; nor can a street be so obstructed as to deprive the public of its use as a highway. *Stack v. City of East St. Louis*, 85 Ill. 377.

The erection by a city of a water tank in a street, and the erection and operation of a steam engine in connection therewith, even for the purpose of supplying the city and its residents with water, is not a use to which the street may legitimately be put. *City of Morrison v. Hinkson*, 87 Ill. 587.

A city has no power to so appropriate a part of a street, as that the public can not use the part of the street so appropriated. The public has a right to the use of a street for its entire width. It is no answer on the part of a person obstructing permanently a part of a street, to be able to say that the part of the street not obstructed furnishes free transit and is of sufficient width. If the city authorities of Le Roy think the street is wider than necessary, it might, by proper proceedings, perhaps, vacate a part of the street, but while it remains unvacated the public is entitled to the unobstructed use of the whole street. *Stephani et al. v. Brown*, 40 Ill. 428; *Smith et al. v. McDowell*, 148 Ill. 51.

A municipality holding the streets in trust for the public, and having no authority to convey or divert them for other uses, it would seem inevitably to follow, that they can have no power to grant to individuals rights or easements in the street which in any way interfere with the

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duty of preparing them for public use, for it is obvious that if such rights may be granted, then the practical use of the streets may become so burdened with private rights as to place it beyond the pecuniary ability of the city to discharge its duty to the public with reference to them. It is not consistent to say that the city owes a duty to the public and yet that it may voluntarily place it beyond its power to discharge that duty. *City of Quincy v. Jones*, 76 Ill. 242; *Smith v. McDowell*, 148 Ill. 51.

A city has no power to grant or permit an exclusive use of a street or any part thereof to a private individual or corporation. *St. Louis A. & T. H. Railroad Co. v. City of Belleville*, 122 Ill. 376; *The People ex rel. v. Walsh et al.*, 96 Ill. 248; 2 *Dillon on Mun. Corp.* (3d Ed.), Sec. 688.

A municipal corporation holds the legal title to the grounds dedicated for streets, in its governmental capacity, in trust for the public use, and therefore can not invest private parties with any rights inconsistent with that use, and the statute of limitations will not therefore run in favor of a private party to bar the rights of the public. *Lee et al. v. Town of Mount Station*, 118 Ill. 304; *City of Quincy v. Jones*, 76 Ill. 231; *Dillon on Mun. Corp.*, Secs. 529-533.

The primary purpose of a street is for the public use and it is not within the power of a municipality to divert the street to permanent private uses. But every obstruction of a street is not illegal, such as a necessary and temporary obstruction incident to its use or repair, the temporary deposit of earth or material in improving adjoining lots, and excavations under the street authorized by the municipality, if temporary, and reasonably necessary; the test in all such cases being that the interruption shall be reasonably necessary and shall not be continued for an unreasonable time. 2 *Dillon on Mun. Corp.* 581 *et seq.*; *Angell on Highways*, Chap. 6; *Wood on Law of Nuisances*, 262 *et seq.*

But the extension of an obstruction to the free use of all or part of the street for the exclusive benefit of the lot owner, and to remain permanently, is a purpresture and is

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per se a public nuisance, which the town council of Leroy had no power to license, or by its refusal to remove it, maintain. Wood on Nuisances, 283 *et seq.*; Smith et al. v. McDowell, 148 Ill. 67; Pettis v. Johnson, 56 Ind. 139.

The permanent encroachment upon a street unauthorized directly by the legislature and the creation of purpresture therein, which obstructs the free and uninterrupted passage of the public is, as a matter of law, a public nuisance. The matter of inconvenience to the public, or that sufficient of the street may remain unobstructed to still accommodate the public travel, can not be considered. The trustee of the public municipality is charged with the duty of keeping and maintaining the streets, in all their parts, open and unobstructed, and in a reasonably safe condition for the public use. Smith et al. v. McDowell, 148 Ill. 68.

As showing that a city can not grant or permit the use of any part of a street for private purposes, it is held that where power is given to a city to vacate a street this power is to be construed in view of the purposes for which the municipality is invested with control of the streets, and its right of vacation is to be exercised only where its authorities, in the exercise of their discretion, determine the street is no longer required for the public use or convenience, and they have no power to vacate a strip of land along and in a public street for the sole purpose of enabling a private person to occupy such strip of the street with a permanent structure, appurtenant to his building abutting upon the street. Smith et al. v. McDowell, 148 Ill. 51.

ROWELL, NEVILLE & LINDLEY, attorneys for appellees.

Where the public have long withheld the assertion of control over the streets, and private parties, by the acts of the public, or those representing the public, have been induced to believe the streets abandoned by the public, and on the faith of that belief, and with the acquiescence of those representing the public, have placed themselves, by making structures or improvements in the streets, in a situation where they must suffer great pecuniary loss if those

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representing the public be allowed afterward to allege the street was not abandoned, the doctrine of equitable estoppel may be applied. *Chicago, Rock Island & Pacific Railroad Co. v. City of Joliet*, 79 Ill. 25.

Open and exclusive adverse possession by private parties and complete non-user by a city for more than twenty years estops a city from claiming the property where the circumstances would make it inequitable for the city to claim that there had been no abandonment. *City of Peoria v. Johnston*, 56 Ill. 45; *Village of Winnetka v. Prouty*, 107 Ill. 218; *Village of Auburn v. Goodwin*, 128 Ill. 57; *Hewes v. Village of Crete*, 68 Ill. App. 305.

Long acquiescence in a boundary line estops the parties from denying its correctness. *Kerr v. Hitt*, 75 Ill. 51.

While municipal corporations are not, as respects public right, within ordinary limitation statutes, still the principal of an *estoppel in pais* applicable in such cases as this, leaves the court to decide the question not by mere lapse of time, but by all the circumstances of the case, and to hold the public estopped or not, as right and justice may require. *Chicago R. I. & P. R. R. Co. v. City of Joliet*, 79 Ill. 25; *Chicago & N. W. R. R. Co. v. The People ex rel.*, 91 Ill. 251.

It is the general doctrine that municipalities under the power of exclusive control of their streets may allow any use of them consistent with the public object for which they may be held.

Building vaults under the streets, alleys and sidewalks is permissible, and a permit, when accepted and acted on by the holder by making costly improvements required, will constitute a contract between the city and the holder of the permit irrevocable at the mere will of the city. *Nelson v. Godfrey*, 12 Ill. 20; *Gridley v. City of Bloomington*, 68 Ill. 47; *Chicago Mun. Gas L. & F. Co. v. Town of Lake*, 130 Ill. 42; *Gregsten v. City of Chicago*, 145 Ill. 451.

The owners of lots bordering upon streets have a right to make a reasonable and proper use of the same. What may be deemed such reasonable use depends much upon the local situation and public uses. *O'Linda v. Lothrop*, 21 Pick. 292; *Underwood v. Carney*, 1 Cush. 235.

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It is a legitimate use of streets to grant to persons or companies the right to erect poles and wires to supply electric light to consumers. *Dickson v. Kewanee Electric Light & Motor Co.*, 53 Ill. App. 379.

MR. JUSTICE GLENN DELIVERED THE OPINION OF THE COURT.

This is a proceeding by mandamus to compel appellees to remove certain obstructions placed on Center street in the city of Le Roy in McLean county. Center street runs east and west and Buck street north and south through the city of Le Roy. The I. B. & W. Railroad was built and opened through the city of LeRoy in 1870. The railroad enters the city from the northwest and passes a little south of east across the city, running diagonally over the intersection of Center and Buck streets. In 1870 there was a large flouring mill situated on the southwest corner of block 23 in the city of Le Roy. The north line of Center street is the south boundary line of block 23, and the east line of Buck street is the west boundary line of block 23. The flouring mill was eighteen to twenty feet east of the east line of Buck street, and thirteen to fourteen feet north of the north line of Center street. Barnum & Keenan purchased this mill and block 23, upon which it was situated. Desiring to enlarge the flouring mill so as to fit it for a grain elevator as well as for milling purposes, they in 1872 applied to the then town board for permission to put posts a short distance in the street to support the proposed addition to the second story of the mill, and also for permission for the railroad company to run a spur track along the south side of the mill. Both permits were granted. Barnum & Keenan after procuring permission built an extension on the south side of the mill sixteen feet wide and forty-eight feet long, and eleven feet above the level of the street, supported by five posts, twelve by twelve in size and standing some two and one-half feet south of the north line of Center street at the west and some six feet at the east end. In this extension are four cribs or bins, twelve by sixteen feet, for storing grain, with a capacity of about three thousand

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bushels to the bin. Upon the completion of these bins by which this part of the mill was converted into an elevator, the railroad company built a spur track from their main line under the bins, and eastward two-thirds of the way across the block, making room for two or three cars beyond the elevator. Owing to a decline in Center street going east the grade of the railroad track at the east end is higher than the traveled part of the street, four or five feet, and bends a little to the south, so that at the east end it is some six feet south of the north line of Center street. Under the bins on the railroad track is a set of railroad scales to weigh cars. The making of these improvements cost about three thousand dollars.

By permission of the town board of the then town of Le Roy, Barnum & Keenan, in 1873, erected a platform scale at a cost of from six to eight hundred dollars at the southwest corner of the intersection of Center and Buck streets. The scales extend into the street about seven feet, are on a level with the surface of the street, and are covered by a roof, supported by four posts. Charly & Payne bought their property of Barnum & Keenan and now own it. The business houses are on Center street and about one-fourth of a mile east of the mill. The width of Center and Buck streets is sixty-six feet.

The obstructions complained of are the elevator bins and the five posts supporting them, placed over the north line of Center street at the west end two and one-half feet, and at the east end six feet, and the platform scales at the southwest corner of the intersection of Center and Buck streets, extending into Center street seven feet from the south line. The former were placed where they now are in 1872, and the latter in 1873. As to the facts in this case there is no substantial disagreement. There is but one question of law arising in the case. The authority and control of the mayor and aldermen over the streets and alleys of the city of Le Roy, with the restrictions and limitations stated in the authorities cited by appellant are admitted. They, however, are not applicable to the facts and circumstances in this case.

While the statute of limitations does not apply in cases of this character, the defense of equitable estoppel from abandonment or non-user may be invoked. This is the defense invoked in this case by the appellees. The Supreme Court, as an illustration of this doctrine in discussing the question, have said in *Lee v. Town of Mound Station*, 118 Ill. 317: "It is true we have held where the public have long withheld the assertion of control over streets, and private parties have been by the acts of those representing the public, induced to believe the streets abandoned by the public, and on the faith of that belief, and with acquiescence of those representing the public, they have placed themselves, by making structures or improvements in the street, in a situation where they must suffer great pecuniary loss, if those representing the public be allowed afterward to allege that the street was not abandoned, the doctrine of equitable estoppel may be applied."

It is further said with reference to this doctrine: "There is no danger in recognizing the principle of an *estoppel in pais* as applicable to such cases as this, as it leaves the courts to decide the question, not by the mere lapse of time, but by all the circumstances of the case, to hold the public estopped or not, as right and justice may require." *Jordan v. City of Chenoa*, 166 Ill. 530; *Chicago, R. I. & P. R. Co. v. City of Joliet*, 79 Ill. 25; *County of Piatt v. Goodell*, 97 Ill. 84; *Village of Winnetka v. Prouty*, 107 Ill. 218; *Village of Auburn v. Goodwin*, 128 Ill. 57; *City of Peoria v. Johnston*, 56 Ill. 45.

In this case the municipal authorities consented to the erection of the structures now complained of where they now encroach on the street, more than twenty-four years ago, and have acquiesced in their remaining all this time. No one has made any objections to their being there, until just before the commencement of this suit, complaint was made by appellant. The owners of these structures were in good faith induced to believe, and did believe they would not be interfered with by the public authorities, and erected the elevator, and the spur of the railroad running into the mill,

at an expense of about \$3,000, and the platform scales at a cost of \$700. If those representing the public are compelled to remove these structures and improvements, the appellees must suffer great pecuniary loss. It seems to us from all the facts and circumstances in this case it would not be equitable or just to do it, and the doctrine of equitable estoppel should be applied to this case.

The judgment of the Circuit Court is affirmed.

Wm. Nevius Banking Co. v. John H. Brunges.

1. RULES OF COURT—*Must be Obeyed*.—A judgment will be reversed for a failure of an appellee to file briefs as required by the rules of the court.

Transcript, from a justice of the peace. Appeal from the County Court of Calhoun County; the Hon. JOHN ZAHRLI, Judge, presiding. Heard in this court at the May term, 1897. Reversed and remanded. Opinion filed December 2, 1897.

HENRY T. RAINEY, attorney for appellant.

No appearance for appellee.

OPINION PER CURIAM.

The appellant has filed his briefs and abstracts of the record herein, in compliance with the rules of this court, but the appellee has failed to comply with the rules in not filing his briefs. The judgment of the County Court of Calhoun County is therefore reversed, and the cause remanded to that court, under rule 30 of this court, for want of briefs by appellee. See *Stark Bros. Nursery and Orchard Co. v. J. H. Hall*, 60 Ill. App. 139; *Urbana & Champaign Electric Street Ry. Co. v. Minnie Elsemiller*, 60 Ill. App. 144; *Russell et al. v. Payne*, 65 Ill. App. 471; *Blackman et al. v. Lewis*, 69 Ill. App. 186; *Hamilton v. Andrews*, 68 Ill. App. 393. Reversed and remanded.

St. Louis Loan and Investment Co. v. J. W. Yantis,
Use, etc.

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1. **BUILDING ASSOCIATIONS—Effect of Assignment of Stock, After Notice of Withdrawal.**—An assignment of stock of a building association after notice of withdrawal has been served, is a mere assignment of a demand against the association, and does not make the assignee a stockholder, and in case suit is instituted it should be in the name of the assignor.

2. **SAME—Certificate Issued to Local Stockholder Binding on Foreign Association as Against Foreign Charter or Statute.**—Where a foreign building and loan association comes into this State to do business it can have no greater rights than domestic associations of like character, and where its charter or the statute of the State under which it was incorporated provides restrictions for the withdrawal of stock not contained in ours they will not be permitted to prevail over the terms of the certificate which is issued to the Illinois stockholder.

3. **SAME—Deductions from Amount Paid in by Withdrawing Stockholder.**—There is no provision in the statutes of this State for deducting a net loss from the amount to be paid a withdrawing stockholder of a building association, and as long as such an association transacting business in this State, though organized under the laws of another State, is a going concern and doing business, it must pay a withdrawing stockholder without any such deduction.

Assumpsit, on building association stock. Appeal from the Circuit Court of Sangamon County; the Hon. JAMES A. CREIGHTON, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed December 2, 1897.

PALMER, SHUTT, HAMILL & LESTER, attorneys for appellant.

McGUIRE & SALZENSTEIN, attorneys for appellee.

MR. PRESIDING JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

On the 26th of June, 1893, J. W. Yantis subscribed for and became the owner of four shares, of the par value of \$2,000, of the capital stock of the St. Louis Loan and Investment Company, a Missouri corporation doing business in Illinois.

It was provided by the certificate issued to him that he should pay as dues ten dollars for the period of ninety-six months, at which time the stock should mature. It also contained a provision that the stock could be withdrawn at any time on giving fifteen days notice, in which event the holder should be repaid all he had paid as dues and six per cent interest thereon.

After paying \$280 as dues Yantis, early in November, 1895, gave written notice of his election to withdraw and on the 4th day of that month delivered his pass book and certificate to John G. Drennan, who was at the time representing the company at Springfield, Illinois. The company declined to pay upon the ground that there were no funds on hand applicable to the payment of withdrawals, and because no action could be taken until a meeting of the directors of the company.

On the 29th of November, 1895, Yantis made an assignment of his stock to David R. Levy, and on the following day this suit was commenced to recover the amount of dues paid and six per cent interest thereon. A jury was waived and the case was tried by the court, who found for the plaintiff, and rendered judgment against the defendant for the full amount of the dues paid and six per cent interest, amounting to \$329.50.

Upon the trial of this case in the Circuit Court it was contended as a matter of law that, as between the plaintiff and David R. Levy, the plaintiff was estopped from maintaining the suit against the defendant by reason of his having sold and assigned his stock to Levy. That contention was embodied in a proposition of law submitted to the court and refused. It is now insisted upon as a ground for reversing the judgment.

We can not regard the transfer of the stock to Levy as more than a mere assignment of Yantis' demand against appellant. It did not make Levy a stockholder. To accomplish that the certificate required a formal transfer to be made on the books of the company. If Yantis' notice of withdrawal was sufficient he became thereby a creditor, and

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when he made the assignment to Levy, the stock not being negotiable paper, it was necessary to bring the suit in his name.

Appellant denies the sufficiency of the notice of withdrawal given by Yantis. It was provided by the statute of Missouri under which appellant was organized and did business, that any stockholder wishing to withdraw should give thirty days' notice of such intention, and that the notice should be given at a regular meeting of the board of directors. The certificate which was issued to Yantis contained this clause: "Stock can be withdrawn at any time upon giving fifteen days notice, when the holder will receive the dues paid in with interest at the rate of six per cent per annum." It is clear that this clause in the certificate violates the provision of the Missouri statute above mentioned. Appellant, therefore, contends that any provision of the certificate fixing a shorter time for notice of withdrawal is absolutely void.

There is in the statute of Illinois no such inhibition with reference to the length of notice which the stockholder must give of his intention to withdraw as that contained in the Missouri statute. Where a foreign building and loan association comes into this State to do business it can have no greater rights than domestic associations of like character, and where its charter or the statute of the State under which it was incorporated provides restrictions for the withdrawal of stock not contained in ours, they will not be permitted to prevail over the terms of the certificate which is issued to an Illinois stockholder. We are clearly of the opinion that the notice for withdrawal was sufficient, not only with reference to length of time, but also with reference to the manner in which it was given. Yantis, after applying to John G. Drennan, the collector and local representative of appellant at Springfield, followed the directions of Drennan, and gave just such notice as he suggested and the certificate required.

In reply to appellee's notice for withdrawal, appellant's secretary, at St. Louis, wrote appellee that the State super-

visor of Missouri had taken charge of the company, and sent a report of the supervisor showing that the company had been so managed that it had sustained a net loss of forty per cent. In a section of the Missouri statute it is provided that "should there have been a net loss instead of a net gain, then such withdrawing stockholder shall receive the actual amount paid, less his proportion of the net loss." It was contended in the court below and is here contended, that because of that statutory provision, and the fact that there had been in the management of the affairs of the company a net loss of forty per cent, no greater judgment could be rendered than sixty per cent of the amount paid, even if it be held that the notice for withdrawal was sufficient. Waiving the question of whether there was in fact a net loss we are not disposed to apply that provision of the Missouri statute. Under our statute there is no provision for deducting for net loss in event of withdrawal. As long as a building and loan association is a going concern and doing business it must pay a withdrawing stockholder without any such deduction. There is nothing in the record of this case showing that appellant is not a going concern. The letter of Johnson, the secretary, shows that it was to continue in business under a plan of the supervisor to overcome the loss which had been sustained.

Numerous propositions of law were tendered to the court by appellant and refused. They were to the effect that the statutes of Missouri control and govern the rights of the parties with reference to the notice of withdrawal and the amount of appellant's liability. In refusing them the court evidently entertained the views expressed by us, and we hold that they were rightfully refused without further extending this opinion.

The judgment below is right and should be affirmed.

Wabash Railroad Company v. Benjamin F. Pickrell.

1. **RAILROADS—*Liability of, for Failure to Fence Track.***—It is sufficient for a plaintiff suing a railroad for the value of stock alleged to have been killed on account of a failure of the company to maintain proper fences and cattle-guards, to show that the stock was killed at a point where the company was required to fence; he need not show that such stock entered upon the right of way at a place where the company was required to erect and maintain fences and cattle-guards.

Trespass on the Case, for the value of stock killed by a railroad. Appeal from the Circuit Court of Sangamon County; the Hon. JAMES A. CREIGHTON, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed December 2, 1897.

GEO. B. BURNETT, attorney for appellant.

In this State it is held that the statute requiring railroads to fence their tracks ought not to be construed so as to embrace that which is not within the statute, and that depots and stations are not embraced within its terms. That it is only side tracks not at stations or depots, and such parts of side tracks as do not constitute part of the depot yards, that can be held to be within the statute. *Chicago, B. & Q. R. R. Co. v. Hans*, 111 Ill. 114.

It was not sufficient for plaintiff to show that the horse in question was killed at a point where appellant was required to fence; it was incumbent on him to show by a preponderance of the evidence that the animal entered upon the right of way at a point where appellant was required to erect and maintain fences and cattle-guards. The place where the animal was struck and killed is immaterial. *Great Western R. R. Co. v. Morthland*, 30 Ill. 451; *Bremmer v. Green Bay S. P. & N. R. R. Co.*, 61 Wis. 114.

A railroad company is not required to fence its road at a place where a fence would interfere with its own right in operating its road or transacting its business, nor where the rights of the public in doing business with the company would be interfered with. *Toledo, Wabash & Western R. R. Co. v. Chapin*, 66 Ill. 504.

The terms "station" and "depot" mean the same thing, and include the entire grounds used by the company at the station. *Pittsburg, F. W. & C. R. R. Co. v. Rose et al.*, 24 Ohio St. 219.

CONKLING & GROUT, attorneys for appellee.

Suppose it was true that the mare went upon the track between the elevator and stock pen, and that it was an excepted place, and she then ran west on the track a half a mile west of excepted point, for lack of fence and cattle-guard, still the company was liable. *Atchison, T. & S. F. R. R. Co. v. Elder*, 149 Ill. 173.

MR. PRESIDING JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment rendered for appellee against appellant for \$335, in a suit to recover for the killing of a valuable mare which had gone upon appellant's railroad track and was struck by a passing train.

The negligence charged in the declaration was failure to fence the railroad track and right of way, and erect cattle-guards thereon at a place west of the station of Lanesville, in Sangamon county, where the mare was killed.

Lanesville is a small, unincorporated village, the buildings consisting of appellant's depot, two elevators, an elevator office, two stores, and eight dwelling houses. In addition to its main track, appellant has a side track there, extending west from the depot about half a mile. About 230 feet west of the point where the side track connects with the main track is a cattle-guard. From that cattle-guard to the depot there is neither fence nor cattle-guard. A short distance west of the depot and adjoining the side track are two elevators and stock pens.

The mare, with other horses, escaped from appellee's pasture into the public highway, and from thence upon the right of way. She was struck by an engine on the main track at a point nearly half a mile west of the depot and about 300 feet east of where the side track joins the main track. The

Wabash R. R. Co. v. Pickrell.

evidence clearly shows that she was killed at a point where it was the duty of appellant to fence against stock.

The evidence also shows that all that portion of the right of way between the depot and the stock pens was necessarily kept open for the convenience of the public in transacting business with appellant. It was not the duty of appellant to fence that portion of its track. At some point between the stock pens and the place where the mare was killed, there should have been a cattle-guard connected with a fence.

It is contended that she went upon the track between the west elevator and the stock pens, at a place where the company was not required to fence, and for that reason appellee was not entitled, under the pleadings, to recover. The evidence does not clearly show where she entered upon the track. No one saw her when she did so. It was shown that there were tracks leading from the highway through the space between the elevator and the stock pens onto the railroad, but it was not shown that there were no tracks from the highway to the railroad at any point between the stock pens and the cattle-guard. Jos. P. Kent testified that a few minutes before hearing the whistle of the engine he saw the horses (some ten or twelve in number) going west on the highway past the elevator and stock pens. But if the evidence was clear that the mare went from the highway onto the railroad between the elevator and the stock pens, appellant would be liable. There was nearly half a mile of unfenced track where the statute imposed the duty of erecting fences and cattle-guards suitable to keep out stock. Had appellant performed its duty in that regard, appellee's mare could not have gone to the point where she was struck by the engine. There should have been a cattle-guard, connected with a suitable fence, at some point between the stock pens and the place where she was killed. She went from an excepted place on appellant's right of way to a place that was not excepted because there was not a cattle-guard there as required by statute. The effect of a holding in accord with appellant's contention in this class of cases

would be to make a railroad company that had failed to fence any portion of its road liable only for injury to stock that had come upon the right of way at a point where the statute required it to fence, and not liable for injury done to stock that had come upon the right of way at a point not required to be fenced, and had gone from there to a place where the statute did require it. In other words, a company having no fence or cattle-guards whatever would not be liable for stock that had come upon the right of way at a highway crossing and, after wandering along the track, was killed at a place required to be fenced. In carrying out the design which the legislature had for the protection of the traveling public, as well as for the owners of stock, the statute provided for cattle-guards as well as fences. To hold as contended for would violate the purpose of the legislation.

We are unable to concur in the contention that the judgment should be reversed because appellee failed to prove the averments of his declaration. In the second count it is averred that the defendant "failed to fence its track and right of way or erect cattle-guards thereon at and near the west end of its station yards at Lanesville, and west from that point for a long distance, to wit, half a mile, suitable and sufficient to prevent horses from getting on such railroad track and right of way, whereby and for want of such fence and cattle-guard a certain mare of plaintiff of the value of \$500 went upon said railroad track and right of way and was killed by the engine and cars of the defendant." The count covers the point where she went on the track as well as where she was killed.

With the views above expressed it is not necessary to discuss in detail the refused propositions of law.

We do not think the damages fixed by the court were excessive. The animal killed was a valuable brood mare with foal, and was shown to be worth at least \$300. An allowance of \$300 for the mare and \$35 for attorney fees did appellant no injustice.

Judgment affirmed.

George L. Zink et al. v. Wells, Fargo & Co.

1. **AMENDMENTS**—*Changes in the Form of Action.*—There is no reason why a person who has brought suit in replevin and been unable to find the property should be denied the right to change his action to assumpsit.

2. **PRACTICE**—*When Depositions Should be Objected to.*—Where a commissioner to take the deposition of a witness has improperly refused to allow one of the parties to cross-examine such witness, the court may properly deny a motion to suppress the deposition and order a new commission to issue to allow the party aggrieved an opportunity to examine the witness.

3. **STOLEN MONEY**—*Transfer of Title to.*—A thief can not, by written order, assign stolen money in consideration of services to be performed in the future and thereby give to the assignee a title that will prevail over that of the true owner.

4. **ASSUMPSIT**—*For Money Had and Received—When it Will Lie.*—An action of assumpsit for money had and received will lie whenever one person has received money which in justice belongs to another and which in justice, and right should be returned, and under this rule assumpsit may be maintained to recover the value of money that has been stolen.

Assumpsit.—Appeal from the Circuit Court of Montgomery County; the Hon. JACOB FOUKE, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed December 2, 1897.

HOWETT & JETT, attorneys for appellants.

In general whenever one's property has been wrongfully taken from him, he has his election to proceed against the wrongdoer in replevin, trespass or trover, or he may waive the tort and sue in assumpsit for the value of the property. These two classes of actions are based upon inconsistent theories. The first proceeds upon the theory that the title to the property has never passed from the plaintiff; the last proceeds upon the assumption of a sale of the property, whereby the title passed to the defendant. The remedies are not concurrent and are based on inconsistent rights. Whenever the law supplies to a party two or more methods of redress in a given case, based upon inconsistent theories, the party is put to his election, and his choice of either is a

bar to his resort to the other. 28 Am. & Eng. Ency. of Law, 570; 7 Ency. of P. and P., 361.

Here appellee first brought an action in replevin, adding a count in trover. This was an election by appellee between inconsistent remedies and was conclusive upon it, and appellee should not thereafter have been permitted, over objection of appellants, to amend its form of action and declare upon a cause of action that was wholly inconsistent with the election first made. The special plea, to which the court sustained a demurrer, set out this election of appellee to proceed in tort and denied the right of appellee thereafter to proceed on account of the same cause of action, in assumpsit. The reason for this is that when it becomes necessary to choose between inconsistent rights and remedies—to which election appellee was put when about to bring suit—the election, when made, with a knowledge of all the facts, will be final and can not be reconsidered, even when no injury has been done by the choice or would result from setting it aside. *Terry v. Munger*, 121 N. Y. 161; *Conrow v. Little*, 115 N. Y. 387; *Harms v. Stier*, 51 Ill. App. 234; *Carper v. Crowl*, 149 Ill. 465; *Brumbach v. Flower*, 20 Ill. App. 219.

There can be no claim in this case that appellants received the money in question for the use of the plaintiff. The facts rebut any such presumption. They received it as their money and applied it upon their contract with the party then in possession of it. As between such party and plaintiff, it is true, plaintiff was entitled to recover the money, but we submit that when appellants received the money as their own and for their own use, an action in assumpsit can not be maintained against them by plaintiff for the same. *Town of Rushville v. President, etc., of Rushville*, 39 Ill. App. 503; *Trumbull v. Campbell*, 3 Gilm. 502; *Hall v. Carpen*, 27 Ill. 386.

The money in question was wrongfully taken from appellee by Gorman. Appellee might have maintained trespass, trover or replevin against him, or it might have waived the wrongful taking and sued him in assumpsit for the value of

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the money so taken. But the moment it elected to bring an action in assumpsit against him, it thereby instantly confirmed or ratified the act of taking and acknowledged such taking to have been lawful; such waiver of tort would have made the money the money of Gorman. Cooley on Torts, 92; Bank of Beloit v. Beale, 34 N. Y. 473; Terry v. Munger, 121 N. Y. 161; 1 Selwyn's Nisi Prius, 81.

As a general rule the transfer or disposal by the thief of stolen property may be disavowed by the true owner and the property or the value thereof recovered in a proper action against a *bona fide* purchaser thereof; but as to money the rule is otherwise, and where a party has received money *bona fide* in the course of his business, it becomes his property and he has good title thereto against its owner from whom it has been stolen. Miller v. Race, 1 Burr. 452; S. C., 1 Smith Leading Cases, 516; Jones v. Nellis, 41 Ill. 432; Shipley v. Carroll, 45 Ill. 285; Spooner v. Holmes, 102 Mass. 503; Evertson v. National Bank of Newport, 66 N. Y. 14; Bay v. Coddington, 5 Johns. Ch. 54; Coddington v. Bay, 20 Johns. 637; Burson v. Huntington, 21 Mich. 415 (437); 1 Addison on Torts, 500; 1 Hilliard on Torts, 51.

Unless the party receiving the money has actual notice, at that very moment, the holder has no title, or is guilty of gross negligence, he thereafter owns the money against all the world. Notice at any time thereafter, however close or remote, does not affect his title if he gave value. That is to say, to defeat the title of a holder for value, he must, when taking the money, have actual notice, or the facts and circumstances must be such as to show *mala fides* on his part in taking with notice of the defective title. It is not sufficient to show that a prudent man would have been put upon inquiry, or that he was negligent, or did not exert a proper degree of caution. Dutchess Co. Mut. Ins. Co. v. Hachfield, 73 N. Y. 226; Miller v. Race, *supra*; see also "Transfer of Cash, Bank Bills, Checks," etc., in note to Williams v. Merle, 25 Am. Dec. 604.

A holder of money for value is one who pays out property, satisfies an existing indebtedness, incurs a new respon-

sibility in consequence of the transfer, or where a responsibility is incurred upon the strength or credit of the money. In either of these cases, he who takes the money takes it for value, and is a holder for value. *Bay v. Coddington*, 5 Johns. Ch. 54; *Coddington v. Bay*, 20 Johns. 637.

LANE & COOPER, attorneys for appellee.

It is a statutory right of a party to change the form of the action, and this practice has been indorsed by our Appellate and Supreme Courts. Statute of Amendments and Joinders, Sec. 1; Practice Act, Rev. Stat., Chap. 110, Sec. 24; *Garrity v. Hamburger Co.*, 136 Ill. 509.

“Objections to depositions must be made before the trial, otherwise they will be considered waived.” *Kimball v. Cook*, 1 Gilm. 423.

It has been repeatedly held that objections to depositions which might be obviated by issuing a new commission and re-examining the witness can not be heard after the case is called for trial. *Kassing v. Mortimer*, 80 Ill. 602; *Carter v. Carter*, 37 Ill. App. 228; *Frink v. McClung*, 4 Gilm. 577; *Webb v. Alton, etc., Co.*, 5 Gilm. 225; *Town of Sheldon v. Burry*, 39 Ill. App. 154; *Kuhl v. Illinois Staats Zeitung Co.*, 20 Ill. App. 658.

In the case at bar no money was paid or services rendered by appellants when they were notified that the money was stolen and was the property of appellee. They were not *bona fide* holders of this money received in the usual course of business. To constitute one a *bona fide* purchaser he must pay as well as purchase without notice. *Thomas v. Stone, Walker Ch. (Mich.)* 117; *Warner v. Whittaker*, 6 Mich. 133.

“It is a well recognized doctrine that the action for money had and received, may be maintained whenever the defendant has obtained money of the plaintiff which in equity and good conscience he has no right to retain.” *Taylor v. Taylor*, 20 Ill. 650; *Gottschalk v. Smith*, 54 Ill. App. 343.

It is also the law that a party may waive the tort, and charge the wrongdoer in *assumpsit* on the common counts

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as for money had and received. *City of Elgin v. Joslyn*, 136 Ill. 532; *Shober, etc., Co. v. Schedler*, 63 Ill. App. 48.

MR. PRESIDING JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

On the 1st of April, 1896, a man by the name of Conroy Gorman and two others robbed an express car near Lebanon, Mo., and, after blowing open an iron safe, took from the possession of the agent of Wells, Fargo & Company \$800. He came to Litchfield, Ill., a few days afterward, and while the city marshal of that place was attempting to arrest him for some minor offense he dropped \$693 of the money, which he had in a tobacco pouch, by the side of a rail fence. There it was found by a boy two days afterward and was taken by the boy's father to the First National Bank of Litchfield, where it was left as a special deposit. Notice of the finding of the money was published at once in a Litchfield paper. On the 11th of April Gorman made an affidavit claiming to be the owner of the money and delivered to George L. Zink and David R. Kinder, his attorneys, an order on the bank to deliver it to Zink and Kinder, to whom he had made an assignment of the money for legal services to be performed. On a presentation of the affidavit and order the bank delivered the pouch and money to Zink, who placed them in his private lock box in the bank.

The agents of Wells, Fargo & Company, after becoming satisfied that the money was part of that taken by the robbers, and that Gorman was one of them, made demand on Zink for the money, and on his refusal to deliver it, sued out a writ of replevin. On the 21st of April, when the sheriff was about to break open the private box of Zink, Zink unlocked it, showed that the money was not there, and stated that he had taken it out some three days before. The writ was returned to the next term of court, showing service on the defendants, but a failure to get the money. The declaration was in replevin, with a count in trover, and the First National Bank was included as a defendant.

After dismissing as to the bank, the plaintiff obtained leave of the court to change the form of action from replevin to assumpsit and filed a declaration in assumpsit. To that declaration the defendants filed the general issue and a special plea, setting up that as the plaintiff had proceeded first in replevin it could not change its form of action and proceed in assumpsit. To the special plea a demurrer was sustained and the cause was tried by the court without a jury upon the issue raised by the plea of non-assumpsit. The court rendered judgment in favor of the plaintiff for \$693.

To the contention of the appellants that the Circuit Court erred in allowing the amendment changing the form of action, and in sustaining the demurrer to defendant's special plea, it is sufficient to say that ample authority to allow such amendment is given by the statute. (Sec. 1, Chap. 7 (Amendments and Jeofails) and Sec. 23, Chap. 110 (Practice), Rev. Stat.) There is no more reason in denying a party, who has sued in replevin and been unable to find the property, the right to change his action to assumpsit than there is in refusing to allow him to change from assumpsit to debt or from assumpsit to case.

At the November term, 1896, appellants moved to suppress the deposition of Conroy Gorman, taken in St. Louis before Harry L. Christie, a commissioner appointed for that purpose. The motion was supported by the affidavit of one of appellants, showing that at the time of the taking of the deposition they were denied a private interview with Gorman, and that after the examination of the witness had closed and counsel for appellee had held a whispered conversation with the witness and then re-examined him they were denied the right to cross-examine. The witness was at the time a prisoner in the St. Louis jail. He was being held by the authorities of Missouri to answer to the charge of train robbery, and a private interview with him was denied appellants by the guard having him in charge unless it could be had at the jail. The proofs show that at the conclusion of the examination in chief appellants declined to

cross-examine, that counsel for appellee did hold a whispered conversation with the witness afterward and then re-examined him, and that when appellants asked leave to cross-examine it was denied to them. We can not, of course, sanction that action of the commissioner. Neither did the Circuit Court. He did not suppress the deposition, however, but ordered a new commission to issue so that appellants could have an opportunity to cross-examine Gorman. We think such action rested within the sound discretion of the court. By it appellants were given full opportunity to exercise the right which had been denied them by the commissioner at St. Louis. Having failed to avail themselves of that opportunity there was no just ground for objecting to the deposition on the trial.

The facts in this case show a clear right in appellee to recover. Appellants can not be regarded in the light of innocent holders of the money. Before the money was removed from the bank they were notified that it was the property of appellee, and had been stolen from it by Gorman, the party through whom they now claim title. They had paid nothing for it and at that time had performed no service for Gorman that would entitle them to any part of it. A thief can not by written order assign stolen money in consideration of services to be performed in the future and thereby give to the assignee a title that will prevail over that of the true owner. That he can is the head and front of appellant's contention in this case.

Embodied in various propositions of law submitted to the court, and refused, was the idea that where a party who has been deprived of his property by theft waives the tort and sues in assumpsit he so far confirms the wrong-doer's acts that he can not deny that he came rightfully into possession of the property. In other words, although Gorman stole the money and appellee could have maintained replevin or trover to recover it, yet having elected to sue in assumpsit, at the instant of exercising such election it ratified the act of taking and acknowledged that the theft was lawful.

Without going into a detailed discussion of the propositions of law which were refused by the court we will say

that the court could not have done otherwise than refuse them if he entertained the view that assumpsit may be maintained to recover the value of money that has been stolen. It is a well recognized doctrine in this State that assumpsit will lie for money had and received wherever one has obtained the money of another which it is inequitable or unjust for him to retain. The latest expression of our Supreme Court upon this line is as follows:

“An action for money had and received will lie whenever one person has received money which in justice belongs to another, and which in justice and right should be returned. The scope of the action has been enlarged until it embraces a great variety of cases, the usual test being, does the money in justice belong to the plaintiff, and has the defendant received the money and should he in justice and right return it to the plaintiff?” *Wilson v. Turner*, 164 Ill. 398.

We see no reason for reversing the judgment. Judgment affirmed.

Honora Dee v. Dennis McCarthy.

1. VERDICTS—*Contrary to the Evidence*.—While a court of appeal will always hesitate to reverse a judgment for the sole reason that the verdict is contrary to the evidence, it will feel constrained to do so where it is apparent that the jury misconceived the testimony or were actuated by passion or prejudice.

Trespass on the Case, for damage to land. Appeal from the Circuit Court of McLean County; the Hon. ALFRED SAMPLE, Judge, presiding. Heard in this court at the May term, 1897. Reversed and remanded. Opinion filed December 2, 1897.

A. E. DEMANGE, attorney for appellant.

ROWELL, NEVILLE & LINDLEY, attorneys for appellee.

MR. PRESIDING JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

This is an action on the case by appellee to recover damages for disconnecting his line of tile drain from appel-

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lant's at a point within appellant's land whereby it was claimed appellee's land was rendered unfit for raising crops.

Appellant is the owner of 160 acres of land lying immediately northwest of an eighty acre tract owned by appellee. One J. M. Vincent owns a large tract immediately east of appellee's. Vincent had a ten-inch tile drain running across his land with its outlet within a few feet of appellee's line. The water from it flooded the southwest corner of Vincent's and the southeast corner of appellee's land. Both desired an outlet not only for the water discharged from that tile but for other about to be laid through appellee's land. Accordingly on the 5th of July, 1895, a contract was entered into between appellee and appellant whereby a tile drain connecting with Vincent's and running through appellee's land might connect with a fifteen-inch tile drain on appellant's land, some fifty-seven rods north of the southeast corner of her land. Under the terms of the contract appellee was to furnish the tile and put it in, after which all that was laid in appellant's land should become her property. At the point of connection with Vincent it was to be laid two and one-half feet in the ground or at a depth equal to that of Vincent's. It was further agreed that he would not allow any one to connect with his drain without her consent in writing.

Subsequently, without obtaining the consent of appellant, appellee allowed one McGrath to connect with his drain. It is also claimed that in constructing his drain there were points where he did not lay it deep enough to afford Vincent an adequate outlet. At all events, either because of defective construction, or because the capacity of the drain was overtaxed, Vincent did not get the outlet contemplated by the contract and an existing agreement between Vincent and appellant whereby he was to pay her \$150 for the privilege of connecting with appellee's drain.

When appellant discovered that appellee had laid his drain through McGrath's land and allowed him to connect she demanded a settlement, and also made complaint that the drain was not so constructed as to give Vincent an out-

let. He refused to settle or make any changes in the drain, claiming that it was laid lower than Vincent's. Thereupon she removed a portion of the tile on her own land which had the effect to cut off appellee's drainage and back up the water so as to overflow his land and destroy his crop. The leading question in the case was whether appellee's drain was laid sufficiently low to afford Vincent an outlet. If it was, the verdict in favor of appellee should stand. If not, and appellee refused to rectify it, appellant had the right to disconnect and no judgment for damages by reason of the overflowing of appellee's land could be rightfully rendered against her.

While there was some conflict in the testimony it clearly appears that there were points in the course of appellee's drain near its connection with Vincent's where the tile was not laid so low as that of Vincent. While we always hesitate to reverse a judgment for the sole reason that the verdict is against the evidence, we feel constrained to do so where it is apparent that the jury misconceived the testimony or were actuated by passion or prejudice. In this case we feel that great injustice has been done appellant. The verdict should have been for her.

The judgment will be reversed and the cause remanded.

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Alice Wall et al. v. Mattie E. Stapleton.

1. HUSBAND AND WIFE—*Divestment of Interest of Husband in His Wife's Property a Valuable Consideration.*—The divestment of all interest, fixed or contingent, which a husband has or may have in the real and personal property of his wife is a valuable consideration, and will support a note and a mortgage given to secure it.

Foreclosure.—Error to the Circuit Court of McLean County; the Hon. ALFRED SAMPLE, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed December 2, 1897.

PEIRCE & PEIRCE, attorneys for plaintiffs in error.

WILLIAMS & CAPEN, attorneys for defendant in error.

MR. PRESIDING JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

This is a foreclosure proceeding commenced to the February term, 1897, of the Circuit Court.

Plaintiff in error Alice Wall purchased the farm in question of one Myers, in September, 1891, taking a bond for a deed to herself and husband, Michael Wall. In February, 1895, the deed was delivered to Mrs. Wall for the farm, she and her husband joining in a first mortgage of \$7,000 to Parker Bros. to pay the balance due Myers. This \$7,000 loan was further secured by the Walls joining in a chattel mortgage covering all of their personal property. On the same day that the deed and mortgage to Parker Bros. were made and delivered, the mortgage and notes in controversy were made out and signed by Alice and Michael Wall, to John O'Connor; John O'Connor assigned the mortgage and notes to Eda B. Dooley and she assigned them to defendant in error.

To the bill of complaint answer was filed denying that Alice Wall ever gave John O'Connor the mortgage and notes, or that she ever owed John O'Connor any sum of money whatever, or that there was any consideration for the mortgage and notes in controversy, or that there was any legal or equitable liability against plaintiffs in error by reason of the mortgage. The cause was by agreement submitted to a special master, who found against plaintiffs in error and sustained the mortgage, finding the amount due was \$2,795.65, recommending decree for that amount, also finding that Alice Wall was competent to contract February 20, 1895; that consideration for mortgage was adequate, and was a release by Michael Wall to Alice Wall of his entire interest in her property. Exceptions were filed by plaintiffs in error. On hearing of exceptions, defendant in error was allowed to file an amended and supplemental bill. A demurrer interposed to this bill by plaintiff in error, was overruled, and answers by all defendants were

filed. The court then having heard the evidence and argument on the exception, over the objection of plaintiffs in error, called witnesses in open court to testify, and after hearing additional evidence overruled the exception and entered a decree for defendant in error for the sum of \$2,795.65.

Upon the trial below two defenses were interposed. First. That at the time the mortgage was executed, one of the makers, Alice Wall, was *non compos mentis*. Second. That the mortgage was executed without consideration.

Without reviewing in this opinion the testimony of the various witnesses who testified to the mental condition of Mrs. Wall, we will say, after a careful consideration of the record, that we think she was at the time capable of transacting the ordinary business affairs of life. She had, for years, been having trouble with her husband, and had brooded over her wrongs so much that she became highly excited and irrational whenever he was the subject of conversation. The evidence shows, however, that was the extent of her derangement. We are not prepared to hold that because a woman may work herself into a frenzy in talking over real or imaginary wrongs done her by her husband that she is incompetent to do business at other times.

Mrs. Wall and her husband had been getting on very unhappily when this mortgage was executed. She was quite anxious to rid herself of him and have it so arranged that he could claim no interest in the farm she had purchased from Myers. It was agreed between them that in consideration of \$2,200 he should assign all right of every kind in the land, stock, machinery, etc., and all right of inheritance in her estate. In pursuance of that agreement the notes and mortgages in controversy were executed to their son-in-law, John O'Conner. O'Conner never claimed any individual interest in them. He endorsed them in blank and left them with the attorney of Michael Wall, the husband, to be sold. They were first hypothecated to secure a loan of \$1,200, and subsequently purchased by the defendant in error.

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We think there was a valuable consideration for the notes and mortgage. It was the divestment of all interest, fixed and contingent, which Michael Wall had in the real and personal property of his wife. What she did was under the advice of counsel. She was not imposed upon, but really initiated the negotiations, and no dissatisfaction as to the manner in which they were concluded seems to have been expressed by her until proceedings were commenced to foreclose the mortgage.

We are of the opinion that the decree of the court below was right and should be affirmed.

T. J. Kent v. T. L. Barnes.

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1. **PROMISSORY NOTES—*Defense Against Purchaser for Value Before Maturity.***—The purchaser of a note before maturity for a valuable consideration, and without knowledge of any defense, takes a title against which the defenses of the maker can not prevail. Suspicion of a defense, or the knowledge of circumstances calculated to excite the suspicions of a prudent man, will not suffice to defeat the purchaser's title. That result can follow only from bad faith on his part.

Transcript, from a justice of the peace. Appeal from the County Court of McLean County; the Hon. COLSTON D. MYERS, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed December 2, 1897.

FRANK GILLESPIE and ROWELL, NEVILLE & LINDLEY, attorneys for appellant.

WELTY & STERLING and WHITMORE & BARNES, attorneys for appellee.

MR. PRESIDING JUSTICE HAEKER DELIVERED THE OPINION OF THE COURT.

This is a suit upon a promissory note for \$150, payable in one year, executed by appellant to one W. W. Salisbury, and assigned to appellee before maturity. The considera-

tion of the note was the promise of Salisbury, as a physician, to cure appellant's wife and son of a disease known as tuberculosis of the bone. The disease was at the time incurable, and that fact was ascertainable to a physician of ordinary skill and knowledge.

The suit was defended upon the grounds that the consideration for which the note was given had failed, that the execution of it was obtained by fraud and circumvention, and that appellee at the time he purchased it had such notice as should have put him upon inquiry with reference to the consideration and the manner in which the execution of the note was obtained. There was a trial by a jury, which resulted in a verdict for appellee, plaintiff below, under a peremptory instruction to find for the plaintiff and assess his damages at the amount of the principal and interest of the note.

The evidence clearly shows that the consideration for which the note was given had failed. It does not show, however, that appellee at the time he purchased the note knew what the consideration was or under what circumstances it was executed. He knew something of the reputation of Salisbury as a practitioner, and when he received the note discounted it with others to the amount of ten per cent. Proof of that was not sufficient to put him in the position of a purchaser with notice of a defense.

The purchaser of a note before maturity for a valuable consideration, and without knowledge of any defense, takes a title against which the defenses of the maker can not prevail. Suspicion of a defense, or the knowledge of circumstances calculated to excite the suspicions of a prudent man will not suffice to defeat his title. That result can follow only from bad faith on his part. Whatever may be the rule elsewhere and whatever view may have been taken of the question by our Supreme Court in the early history of the State the doctrine here declared is now well established in Illinois. *Comstock et al. v. Hannah*, 76 Ill. 530; *Shreeves v. Allen*, 79 Ill. 553; *Murray et al. v. Beckwith*, 81 Ill. 43; *Matson et al. v. Alley*, 141 Ill. 284.

Culver v. Belt.

There is no evidence in the record tending to show that appellee acted in bad faith or had notice of appellant's defense to the note. In that view no other verdict than the one rendered could have been lawfully returned. The court, very properly, then directed the jury to return a verdict for the plaintiff for the full amount of principal and interest on the note. *The National Bank of America v. The National Bank of Illinois*, 164 Ill. 503.

Judgment affirmed.

E. A. Culver, Adm'r, v. W. S. Belt.

1. *RECEIPTS—Are Open to Explanation.*—A general receipt in full of all demands is open to explanation, and may by satisfactory proof be restrained in its operation.

Claim in Probate.—Appeal from the Circuit Court of Greene County; the Hon. GEORGE W. HERDMAN, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed December 2, 1897.

DOOLITTLE & SCANLAND, attorneys for appellant.

HENRY T. RAINEY, attorney for appellee.

MR. PRESIDING JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment in favor of appellee against the estate of A. T. Perry, deceased, for \$584.40.

The record shows that in the year 1893, A. T. Perry, a wealthy old bachelor, rented a farm to appellee under a contract whereby he was to have one-third of the crops raised, two rooms in the house situated on the farm for his own use, and table board. He was a man well advanced in years and was predisposed to pulmonary and heart troubles. He was taken very seriously ill in the spring of 1894 and remained an invalid until the date of his death, which

occurred on the 24th of June, 1896. He was confined to his bed much of his time and received a great deal of attention and nursing from appellee and members of his family. From time to time money was paid appellee by Perry for services rendered him in that way and for work by way of improvements on the farm. It was for balance alleged to be due at the time of Perry's death that the claim was filed.

The case was tried by the court without a jury. No propositions of law were submitted, and the only ground urged for a reversal of the judgment is that the finding of the court was against the evidence. The record shows a sharp conflict in the testimony. It would render this opinion too long to discuss it in detail.

The trial court had the witnesses before him. His opportunities for judging of the weight to be given to their testimony was superior to ours. - We shall not presume to say that he misconceived their testimony.

Much stress is laid upon the fact that several receipts were given by appellee to Perry in his lifetime and to the administrator which were worded as receipts in full of all demands to date. From evidence that was heard by the court, it is clear to our minds that the receipts were not intended as being in full of all demands, but were intended to relate to and cover particular matters of settlement considered by the parties at the time.

A general receipt in full of all demands is open to explanation, and may by satisfactory proof be restrained in its operation. *Walrath v. Norton*, 5 Gilm. 437; *Frink v. Bolton*, 15 Ill. 343; *Gillett v. Wiley*, 126 Ill. 310.

We see no just reason for disturbing the judgment.

CASES
IN THE
APPELLATE COURTS OF ILLINOIS.

SECOND DISTRICT—MAY TERM, 1897.

72	621
79	484
175	322

Metropolitan Life Ins. Co. v. Annie Mitchell.

1. **LIFE INSURANCE**—*Question of False Statements in the Application.*—The question of the truth or falsity of statements in an application for life insurance is one of fact for the determination of a jury.

2. **EVIDENCE**—*Records of Private Institutions.*—Before the records of medical institutions or of private physicians as to the examination of persons insured in life insurance companies are admissible in evidence, the identity of the person examined should be established.

Assumpsit, on a policy of life insurance. Appeal from the Circuit Court of La Salle County; the Hon. CHARLES BLANCHARD, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed June 26, 1897.

WILLIAM D. FULLERTON, attorney for appellant.

DUNCAN, HASKINS & PANNECK, attorneys for appellee.

MR. JUSTICE CRABTREE DELIVERED THE OPINION OF THE COURT.

This was an action to recover upon a policy of insurance issued by appellant upon the life of Frank Mitchell, the deceased husband of appellee. The application was dated February 27, 1894, and the policy was issued March 8, 1894, and was for the sum of \$1,000.

Appellee and her husband lived in Chicago at the time the policy was issued, but in January, 1895, they moved to La Salle, where the insured died of consumption on March 31, 1895.

The ordinary proofs of death were made out and filed with the company, but payment of the loss was refused.

There is some evidence that appellant called upon appellee for additional proofs of loss, but whether it did or not, we think the refusal to pay was based upon the claim that the policy was procured by fraud on the part of the insured in making false statements as to the condition of his health at the time he made his application.

There was a trial by jury and a verdict in favor of appellee for \$1,000. A motion for new trial was overruled, and appellant brings the case to this court, and assigns upon the record twenty alleged errors, which it insists the court committed in the trial of the cause, and upon which it asks a reversal.

The declaration was in the usual form, to which appellant filed the general issue and ten special pleas, setting up in various forms the claim that at the time he made his application for insurance, the deceased was afflicted with bronchitis and habitual cough; that he was not in sound health, and that he falsely denied having any such troubles, and made other false answers in such application, whereby he fraudulently procured said policy of insurance. Issues were formed on these special pleas, and the whole controversy before the jury was as to the truth or falsity of the statements in the application, and the condition of health of the deceased at the time they were made.

The evidence upon these questions was conflicting, and, if the jury had found the other way, we probably would not have disturbed the verdict, but we can not say the verdict they did find is so manifestly against the weight of the evidence as to require us to set it aside for that reason alone. We fully recognize the proposition that the jury have no right arbitrarily to disregard evidence, and without reason to find a verdict against its clear preponderance, but, after

all, the jury are and must be the judges as to the credibility of the witnesses, and are only bound to give their testimony such weight as, under all the circumstances appearing on the trial, they deem it entitled to. Many things appear in the trial court which have their weight with the jury and trial judge which can not be reproduced here, and hence we have not the same opportunities for arriving at the truth as they have, and therefore in a conflict of the evidence it must be a strong case, and the verdict clearly wrong before we are warranted in setting it aside.

It is to be observed that the claim now is that the deceased was afflicted with consumption when he made his application, and Dr. Dunavan, a witness, who testified on behalf of appellant, gave it as his opinion that on January 8, 1895, when he was called to treat the insured, the latter was afflicted with consumption, and that the disease had then existed not less than eighteen months. If this were true, then insured had consumption at the time his application was made on February 27, 1894. But Dr. Hatheway, a physician of forty years practice in Ottawa, called as a medical expert on behalf of appellee, gives it as his opinion that a person may contract consumption and die of it in six weeks. The report of Dr. Sprague, the physician who examined Frank Mitchell on behalf of appellant before the policy was issued, showed that after a careful examination of the applicant, there was no "hoarseness, cough or other present derangement of function of the respiratory system discoverable by auscultation or percussion," and he further stated that he considered the chances of life of the applicant were first-class. In the face of evidence like this, it can not be said the jury were not warranted in finding that the assured was not afflicted with consumption at the time he made his application for insurance with appellant.

It is strongly urged that the court erred in permitting the cross-examination of Dr. Sprague upon this report, but we think the ruling of the court was entirely proper. The witness was called to identify a part of the papers pertaining to the application, and while he was not asked as to

other things appearing on the same page, to wit, his own report of the examination, yet we think it was relevant to show that he made an examination and to have his report thereof identified, which was substantially the extent of his cross-examination. Even if it were not strictly cross-examination, appellee would have been entitled to the evidence at a later stage of the case, and it can have done no harm to let it come in as it did upon a cross-examination, and we hold it was not harmful error.

Nor do we think there was any error in refusing to admit certain records of medical institutions, and examinations of deceased, made, or alleged to have been made, by physicians who it is claimed prescribed for and treated him for the disease of which he died, about the time or before he made the application for insurance.

Before any such records were admissible, whether made by officers of medical institutions or by private physicians, it was incumbent on appellant to establish the identity of the deceased with the Frank Mitchell concerning whom the records were made. This was not done. There was no pretense of such identification. In a city like Chicago, there are no doubt many Frank Mitchells, and whether or not the deceased was the man referred to in the record was for the appellant to establish before being permitted to use the record as evidence.

We find no error on the part of the court in admitting evidence on behalf of appellee.

The only instruction to which our attention is called in the argument is the fifth given for appellee. It is claimed it was not justified by the condition of the evidence. It is the usual "stock" instruction given in nearly every case where there is a sharp conflict in the evidence, and we are of opinion it was not error to give it in this case.

Finding no serious error in the record the judgment will be affirmed.

Moses W. Resser v. James S. Corwin.

1. **LEASE—Repudiation for Fraudulent Misrepresentations.**—When a tenant desires to repudiate a lease for fraudulent misrepresentations in the execution thereof on the part of the landlord he should do so at once upon the discovery of such misrepresentations.

2. **SAME—Fraud in the Execution.**—A lease under seal can only be defeated by showing fraud in the execution, whereby the party was deceived and caused to sign something that he had not intended to execute.

3. **FRAUD—In the Execution of a Deed—Equity Jurisdiction.**—When a party voluntarily and knowingly executes a deed, even though it be by the fraudulent contrivance of others, it can only be impeached and set aside, and parol evidence received for that purpose, in a court of equity.

4. **DAMAGES—Elements of, After an Abandonment of a Lease by the Lessee—Evidence.**—In an action by the lessor upon a lease after abandonment by the lessee, it is competent, for the purpose of showing the damages sustained by the lessor, to prove how much the demised premises netted him after such abandonment.

5. **SAME—Measure of.**—The measure of damages for the abandonment of a lease by the tenant is the rent agreed to be paid less whatever the landlord could have made out of the premises by the use of due diligence, after it came into his possession.

Covenant, on a sealed lease. Appeal from the Circuit Court of Henry County; the Hon. HIRAM BIGELOW, Judge, presiding. Heard in this court at the May term, 1897. Reversed and remanded. Opinion filed June 26, 1897.

GRAVES & BROWN, attorneys for appellant.

In a suit at law upon an instrument under seal, it is error to allow proof of fraudulent representations as to the consideration for the purpose of defeating the instrument. *Windett v. Hurlbut*, 115 Ill. 403.

If fraud is relied upon as a basis of a claim for damages by way of recoupment, it must have been such as ordinary prudence would not have protected the party setting it up, from. *Noetling v. Wright*, 72 Ill. 390.

The representations must be such as an ordinarily prudent man would rely on as truth. *Grier v. Puterbaugh*, 108 Ill. 602; *Schwabacker v. Riddle*, 99 Ill. 313.

If the party could have ascertained the falsity of the statements by ordinary diligence and attention, he had no right to rely upon them. *Tuck v. Downing*, 76 Ill. 71; *Dunbar v. Bonesteel*, 3 Scam. 32; *Schwabacker v. Riddle*, 99 Ill. 343; *Budlong v. Cunningham*, 11 Brad. 28; *Grier v. Puterbaugh*, 108 Ill. 602; *Linnington v. Strong*, 111 Ill. 152; *Eames v. Morgan*, 37 Ill. 260.

If a party is induced to enter into a contract by fraud, he may avoid the contract, if he seeks to do so within a reasonable time after the discovery of the fraud. *Patton v. Campbell*, 70 Ill. 72; *Warren v. Tyler*, 81 Ill. 15; *Hall v. Fullerton*, 69 Ill. 448; *Warren v. Walbridge*, 61 Ill. 173; *Rogers v. Higgins*, 57 Ill. 244; *Cox v. Montgomery*, 36 Ill. 396; *Cox v. Montgomery*, 43 Ill. 110.

A lessee can not surrender premises leased to him before the expiration of the term, so as to absolve himself from the payment of rent thereafter, without the consent of the lessor. *Stobie et al. v. Dills*, 62 Ill. 432; *Am. & Eng. Ency. of Law*, Vol. 12, 752, and note; *Am. & Eng. Ency. of Law*, Vol. 12, 751.

DUNHAM & FOSTER, attorneys for appellee.

MR. JUSTICE CRABTREE DELIVERED THE OPINION OF THE COURT.

Appellant, by written lease under seal, demised certain land to appellee, for a term of five years from January 1, 1893, at a rental of one hundred dollars for the first year and two hundred dollars per year for the four succeeding years.

Appellee went into possession, and after occupying about fourteen months abandoned the premises after tendering the possession to appellant. There is a dispute between the parties as to whether appellant accepted the possession and we think a preponderance of the evidence shows he refused to do so, but when the premises were abandoned he took and held possession, and after the second year of the demised term expired he brought this suit.

Resser v. Corwin.

The action was covenant, and various breaches were assigned, viz., non-payment of rent, a failure to trim hedges, to spread manure, to preserve the trees, and farm the land in a workmanlike manner according to the terms of the lease. Appellee pleaded *non est factum*, and there was a stipulation that under this plea any defense might be made that could be made under any plea well pleaded.

There was a general denial of all the breaches relied on except the covenant to pay rent, and as to that breach there was an attempt to defend on the ground that appellee had been induced to execute the lease by fraudulent misrepresentations of appellant, and a further attempt was made to claim damages by way of recoupment, on account of the defective quality of the land by reason of its liability to overflow.

There was a trial by jury resulting in a verdict and judgment in favor of appellee, a motion for new trial being overruled.

It seems there had been a former suit before a justice of the peace, brought by appellant to recover the first year's rent. In that suit the only defense set up by appellee was a set-off of \$34 for work and labor performed by appellee for appellant. On the trial of the case in the Circuit Court on appeal, appellant recovered judgment for the difference between the \$34 and the \$100 rent due for the first year, and that judgment was paid by appellee.

We think appellee waited too long before attempting to rescind the contract. The lease was made March 22, 1892, and appellee took possession March 1, 1893, and held it for about fourteen months. He had ample means of ascertaining the character of the land, and its liability to overflow, before he took possession. In fact, we think the evidence shows he knew the land was wet and overflowed before he entered upon the performance of the contract, and if he desired to rescind he should have done so within a reasonable time, and would have no right to wait until March 1, 1894, which would certainly be an unreasonable time.

The grounds of the defense were alleged fraudulent mis-

representations of appellant before the execution of the lease, that the land did not overflow.

Having elected not to rescind the contract within a reasonable time, and having treated it as being in full force by occupying and paying rent for the first year, appellee could not set up the alleged fraudulent misrepresentations as a warranty that the land did not overflow, because that would be to contradict, enlarge or vary the terms of the written lease which contained no such warranty.

The lease, being under seal, could only be defeated by showing fraud in the execution, whereby the party was deceived, and caused to sign something that he did not intend to execute. When a party voluntarily and knowingly executes a deed, even though it be by the fraudulent contrivances of others, it can only be impeached and set aside, and parol evidence be received for that purpose in a court of equity. *Windett v. Hurlbert*, 115 Ill. 403.

There is no pretense in this case that appellee did not know and understand what he was signing when he executed the lease.

The evidence as to damages claimed by appellee in consequence of the inferior quality of the land on account of overflow, was improperly admitted, and in this we think there was error.

We do not think the evidence as to the suit between the parties for the first year's rent was admissible for the purpose claimed by appellant, that is, to show that appellee was barred of his claim for damages, had he been entitled to recoup damages, which, however, we hold he was not. The supposed demand of the appellee was not of such a nature as he was bound to set up in the suit before the justice of the peace. See *Osborn v. Philpot*, 46 Ill. App. 274.

The evidence offered, however, was admissible to show that the lease at that time was in force, and the adjudication between the parties as to rent due upon it, would have been conclusive as to the existence of the lease.

For the purpose of showing the damages sustained by

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him, appellant offered to prove how much the land netted him after it was abandoned by appellee. The court refused to receive the evidence, and this, we think, was error. If appellant was entitled to recover, his measure of damages would be, the rent agreed to be paid, less whatever he could have made out of the land by the use of due diligence after it came into his possession. In other words, he could only recover such sum as would make him whole. For the purpose of proving a basis for the estimation of damages, the evidence should have been admitted.

The instructions which authorized the jury to allow a recoupment for damages alleged to have been sustained on account of the inferiority of the land and its overflow, were erroneous under the views above expressed, and should not have been given. Other errors in the instructions, if any exist, can be corrected on another trial.

For the reasons given, the judgment must be reversed and the cause remanded.

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72	629
173	497
72	629
896	231

1. *ULTRA VIRES*.—*Not a Defense in a Suit for Damages Caused by Mob Violence.*—The fact that a corporation exceeded its corporate powers by holding property not necessary for the purposes of its incorporation, is not a defense to an action by it against a municipality in which the property was located, for damages sustained by the destruction of such property by a mob.

2. *VERDICTS*.—*Contrary to the Evidence.*—Where a plaintiff establishes a clear right of recovery, and the defendant fails to show any valid or legal defense, and the jury utterly disregard the evidence and the law as given to them by the court, and render a verdict for the defendant, a judgment based upon such verdict ought not to stand, and will be reversed by this court.

3. *APPEALS AND ERRORS*.—*Final Judgment in the Appellate Court.*—Where a plaintiff makes out his case by clear proof, and there is no evidence tending to sustain the issues tendered by the defendant, so that the trial court would have been justified in directing a verdict for the plaintiff, the Appellate Court has the power to, and should reverse a judgment for the defendant and render final judgment for the plaintiff.

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4. *SAME—Rendition of Final Judgment by Appellate Court Does Not Infringe Right of Trial by Jury.*—The reversal of a cause upon the facts and rendition of final judgment by the Appellate Court, is not an infringement of the constitutional right of trial by jury.

Trespass on the Case, for damage to property by a mob. Appeal from the Circuit Court of Bureau County; the Hon. DORRANCE DIBELL, Judge, presiding. Heard in this court at the May term, 1897. Reversed and final judgment rendered. Opinion filed December 17, 1897.

ALFRED R. GREENWOOD and RICHARD M. SKINNER, attorneys for appellant.

In an action under the New Hampshire statute, illegal and improper conduct on the part of the owner of the property will not be presumed, and he need not prove the legality or propriety of his conduct. *Palmer v. City of Concord*, 48 N. H. 211; 97 Am. Dec. 605.

The fact that the premises were kept for illegal purposes is no defense; the proper remedy in such a case being to remove the nuisance and not to destroy the property. *Moody v. Niagara County Suprs.*, 46 Barb. 659; affirmed 36 N. Y. 297.

The fact that a corporation carried on a store not authorized by the charter, is no defense to an action by it against the city in which the store was located for damages sustained in the destruction of such store by a mob. *Spring Valley Coal Company v. City of Spring Valley*, 65 Ill. App. 571.

Upon the evidence, the jury, uninfluenced by prejudice and passion, and under the law, should have found a verdict in favor of the Spring Valley Coal Company. They found, however, for the defendant, when the evidence, with all the inferences that they could justifiably draw from it, was so meager and insufficient to support their verdict, that the trial court would have been warranted in directing them to find for the plaintiff (if any trial court can ever be warranted in so directing); the trial court, however, having failed to do so, we submit that this Appellate Court in rendering the judgment that should have been rendered in the trial court in favor of the appellant will no more invade

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the province of the jury under the law as held in this State, than would the trial court if it had directed what verdict the jury should return. And if it shall appear that the law, under the facts as shown by the evidence in this case, has been improperly applied in the court below, in any respect materially affecting the judgment rendered, it then becomes the duty of this court to reverse the judgment of the trial court, and the power which the lower court might have exercised on the trial in this case, this Appellate Court may exercise on this appeal. *Commercial Ins. Co. v. Scammon*, 123 Ill. 601.

JOHN L. MURPHY and WM. HAWTHORNE, attorneys for appellee.

MR. PRESIDING JUSTICE CRABTREE DELIVERED THE OPINION OF THE COURT.

This was an action on the case, brought by appellant against appellee, to recover damages for the destruction of property by a riotous mob, in the city of Spring Valley on the night of July 6, 1894. The right to bring the suit is founded upon an act of the legislature passed in 1887, and in force July 1, 1887, entitled "An act to indemnify the owners of property for damages occasioned by mobs and riots." 3 Starr & Curtis, 370; Session Laws 1887, p. 237.

The case was tried by a jury resulting in a verdict in favor of appellee, upon which the court rendered judgment after overruling a motion for new trial.

The case has been tried twice with the same results. The first judgment in favor of appellee was reversed by this court, and the cause remanded, for the reasons given in our opinion then filed (see 65 Ill. App. 571). A careful examination of the record now before us, shows that there is no substantial difference in the evidence from what it was upon the former trial. The facts having been fully stated in our former opinion, only a brief restatement of them at this time will be necessary to an understanding of the case.

It appears from the evidence, that appellant is a corpora-

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tion duly organized under the laws of this State, engaged in the business of mining and selling coal at Spring Valley in Bureau county, Illinois. Appellee is a municipal corporation organized under the general law, and on July 6, 1894, Thomas B. Jack was the mayor, John L. Murphy was the city attorney, and Charles J. Fay was city clerk. At this time there was a general strike among the coal miners throughout the United States, and those employed in mines in the vicinity of Spring Valley, while apparently having no particular complaint against appellant, were engaged in a sympathetic strike. In connection with its other business, appellant was carrying on a general store in the city of Spring Valley, and selling goods to its employes and others who saw fit to trade there. On the night of July 6, 1894, a riotous mob consisting of some three or four hundred persons, made an attack upon appellant's store, broke into the same, and carried away or destroyed goods to the value of \$9,066.95, and did damage to the building amounting to \$183.25. These facts are entirely uncontradicted and undisputed, being established by the evidence beyond doubt or controversy. The only defenses sought to be interposed are: 1. That the law is unconstitutional. 2. That appellant was careless and negligent in caring for its property. 3. That inasmuch as it was only authorized by the law of its incorporation to mine and sell coal, it had no right to own or operate a store for the selling of merchandise, and can not recover for its destruction.

A motion was made at the December term of this court, to dismiss for want of jurisdiction, and was then overruled. Counsel for appellee have argued the motion as though it had not already been disposed of, but we think it was properly overruled. The grounds of the motion were substantially the same as those urged when the case was formerly before us. Our reasons for overruling it were then fully stated, and we adhere to the views then expressed.

As to the second point of defense, we fail to find anything in the evidence upon which to base it. The only thing which appellants could have done otherwise than

what it did do to protect its property, would have been a resort to armed force to resist the attack of the mob. We discussed this question at length in our former opinion, and we still think it was not the duty of appellant to provide a police force of its own or to assemble men under arms at its own expense, or to risk the destruction of human life, to obtain that protection which it was incumbent on the city authorities to furnish, and which it had the power to do. In our view of the case, there is nothing in the evidence to show that the officers and employes of appellant acted otherwise than as ordinarily prudent and careful men would have been expected to act under the same or similar circumstances, and hence it was not guilty of negligence or carelessness within the meaning of the statute under which this action is brought; on the contrary, it appears to have used all reasonable diligence to prevent the damage.

The third point was discussed in our former opinion, and we can only repeat what we then said, that in our judgment the proposition that, because appellant may have exceeded its corporate powers, a mob might destroy its property with impunity, finds no support either in sound reason or the adjudged cases. *Ely v. Supervisors of Niagara County*, 36 N. Y. 297.

We do not deem it necessary to pursue the discussion of this question further than to again refer to what was said on the subject when the case was here before.

Upon a careful consideration of the evidence taken upon the last trial, we are of the opinion appellant established a clear right of recovery, and that appellee failed to show any valid or legal defense. No reason is perceived why the jury should have utterly disregarded the evidence, and the law as given to them by the court, and rendered a verdict for appellee; such a verdict was entirely unwarranted; a judgment based upon it ought not to stand, and must therefore be reversed.

The case having been tried twice upon substantially the same evidence, with two unwarranted verdicts in favor of appellee, appellant now insists that it is the duty of this

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court to render a final judgment in its favor upon the evidence appearing in the record.

This question we will proceed to consider.

By Section 80 of the Amended Practice Act (2 Starr & Curtis, 1838, Par. 81) it is provided that "In all cases of appeal and writ of error, the Supreme Court or Appellate Court may give final judgment and issue execution," etc. This language is broad and comprehensive, and it is not limited to cases tried by the lower courts without a jury, but in its terms includes all cases, however they may have been tried.

The right to enter final judgments in this court upon a reversal of the judgment of the court below, was exercised by this court in the case of *Adams v. Slater*, 8 Brad. 72. The action was case for diverting water from the mill of the plaintiff. All the facts were admitted, and the cause was submitted to the court for trial without a jury, resulting in a judgment against the plaintiff for costs. On appeal to this court the judgment of the court below was reversed, and final judgment entered here in favor of the appellant, and on appeal to the Supreme Court the judgment was affirmed. *Druley v. Adam*, 102 Ill. 177. The question as to the power of the Appellate Court to render this judgment does not appear, to have been raised or discussed in the Supreme Court.

The right of the Appellate Court to render final judgment in a case where it finds the facts differently from the finding in the court below, is distinctly recognized in the case of *Commercial Ins. Co. v. Scammon*, 123 Ill. 601. In that case a jury was waived by agreement, the cause tried by the court and judgment rendered for the defendant. The plaintiff appealed to the Appellate Court, which reversed the judgment of the Circuit Court and rendered final judgment in favor of the plaintiff below, from which judgment an appeal was taken to the Supreme Court. It was contended in the latter court that the judgment was void, because the Appellate Court had no authority to render a final judgment contrary to the finding of the trial court

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acting in the place of a jury. It was held that the language of the practice act above quoted was broad enough to justify the judgment as rendered. It was also held that "if the jury were to find for the defendant, when the evidence given at the trial, with all the inferences that they could justifiably draw from it, is so insufficient to support their verdict that the court would have been warranted in directing them to find for the plaintiff, but failed to do so, an Appellate Court, in rendering the judgment that should have been rendered in the Circuit Court, no more invades their province than would the Circuit Court, under those circumstances, had it directed what verdict the jury should return." But as one of the issues of fact had not been found by the Appellate Court as a part of its judgment, the judgment was reversed and the cause remanded to the Appellate Court with directions to render a judgment *de novo*; and if still of the opinion that upon the record before it, the judgment of the Circuit Court should be reversed and final judgment rendered in the Appellate Court for the plaintiff, that such judgment be rendered, and the fact upon which it was based be found and certified.

Upon the cause again coming before the Appellate Court upon the remanding order, it entered a final judgment in favor of the plaintiff for \$8,910 and costs, and certified a full statement of the facts on all the issues as a part of its judgment. The defendant again appealed to the Supreme Court, when the judgment of the Appellate Court was affirmed. *Commercial Union Assurance Co. v. Scammon*, 126 Ill. 355. The case of *Manistee Lumber Company v. Union National Bank*, 143 Ill. 490, was an action of assumpsit. By agreement of parties a jury was waived and the cause tried by the court, which found the issues for the defendant and rendered judgment in its favor. On appeal to the Appellate Court, the judgment of the Superior Court was reversed, and final judgment entered against the defendant below for \$9,629.60 and costs, and execution awarded therefor. The Appellate Court made and certified a full finding of the facts as a part of the judgment, and on appeal to the Supreme Court the judgment was affirmed.

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In the case of *Borg v. Chicago, R. I. & P. Ry. Co.*, 162 Ill. 348, it is held that the power of the Appellate Court to reverse without remanding, given by Section 87 of the Practice Act, when it determines that the facts are different from those found in the court below, is not limited to cases where the trial court might direct a verdict, but extends to cases requiring the weighing of testimony and a comparison of the credibility of witnesses. This decision recognizes the proposition that larger powers are conferred upon the appellate tribunal than exist in the trial court. The case was tried by a jury, resulting in a verdict and judgment in favor of plaintiff below for \$20,000 and costs. On appeal to the Appellate Court the judgment was reversed without remanding, and final judgment was rendered against plaintiff below for the costs. He appealed to the Supreme Court, where the judgment of the Appellate Court was affirmed.

In *Town of Cicero v. Sackley et al.*, 164 Ill. 513, appellee sued appellant to recover a balance due for labor and materials furnished for the improvement of Washington Boulevard. A jury was waived and the cause tried by the court, which gave judgment in favor of the plaintiff below for \$1,127.10. Being dissatisfied with the amount, he took the case to the Appellate Court by appeal, where, upon a hearing, the judgment of the Circuit Court was reversed, and final judgment in his favor for \$3,410.95 was entered by the Appellate Court, and all the facts found and certified as a part of the judgment. On appeal to the Supreme Court, the judgment of the Appellate Court was affirmed, the finding of facts being binding upon the former court, and the power to enter such judgment under Section 87 of the Practice Act is fully recognized. In a still later case, *Everts v. Lawther*, 165 Ill. 487, the defendant in error had filed a claim in the Probate Court of Cook County against the estate of Edward A. Everts, deceased, and it being disallowed, he appealed to the Circuit Court, where, a jury being waived and the cause tried by the court, the claim was again disallowed. On appeal to the Appellate Court,

the judgment of the Circuit Court was reversed, and final judgment rendered in favor of the claimant for \$1,248.19. The Appellate Court found the facts differently from the Circuit Court, and made such finding a part of its judgment, which was affirmed by the Supreme Court, it being held that the judgment was a necessary consequence of the facts found. It was urged that the Appellate Court should have remanded the cause for a new trial, otherwise plaintiffs in error were deprived of their constitutional right to a trial by jury. Held, they were not deprived of such right, because they had waived it, and submitted the case to the court for trial without a jury. And it is said: "In such a case the Appellate Court may give final judgment, if the law, applied to the facts found, authorizes such a judgment." But can it make any difference because a jury has been waived? The same force and effect is given to the finding of the court as to the verdict of a jury. *Cook v. Thayer*, 11 Ill. 617; *Wood et al. v. Price*, 46 Ill. 435.

A jury was not waived in the *Borg* case *supra*, and yet the power of the Appellate Court to weigh the evidence and render final judgment upon its own finding of facts, and against the verdict of the jury, is distinctly recognized and upheld, and such action is held not to violate the constitutional right of trial by jury. As we have said before, the statute is broad enough to give the power to render final judgments in all cases, whether tried by a jury or not, and we see no reason for drawing a distinction in this regard between cases tried by a jury, and those in which a jury is waived, and the cause tried by the court. There would seem to be no difference in principle in rendering judgment in favor of the plaintiff for the amount the evidence clearly shows him entitled to, or rendering final judgment against him for the costs, where the evidence, in the opinion of the Appellate Court, fails to establish his right to recover. Hence it would seem to us the language above quoted from the latter part of the opinion of *Everts v. Lawther supra*, should not be understood as intending to limit the power of the Appellate Court to render final judgment for the plaintiff, to those cases only, in which a trial by jury has been waived.

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In the case at bar, there really being no controverted question of fact in issue, the trial court would have been entirely justified in directing a verdict for the plaintiff, and no doubt would have done so if asked, because the evidence, with all the inferences which can justifiably be drawn from it, is entirely insufficient to support a verdict for the defendant. In such a case an Appellate Court, in rendering the judgment that should have been rendered in the Circuit Court, can not be said to invade the province of the jury. *Commercial Ins. Co. v. Scammon, supra.*

The court has a right to pronounce judgment on the legal effect of admitted facts; and on such facts it is not only the province, but the imperative duty of the court to determine. And in such cases the court does not invade the province of the jury by directing a verdict. *Todd v. Old Colony & Fall River R. R. Co., 7 Allen (Mass.) 207; S. C., 83 Am. Dec. 679.*

To hold that when the facts are clear and undisputed, judgment may not be rendered upon such facts, if the law as applied to the facts authorizes a recovery, because juries disregard the evidence and the instructions of the trial judge, and that the only power of an appellate tribunal is to reverse and remand for a new trial as often as the case comes up under the same conditions, would be a travesty on justice and make legal procedure a farce.

Our conclusion, upon a careful examination of the statute and the decisions of the Supreme Court, is, that we not only have the power to render final judgment for the plaintiff in this case, but upon the evidence found in the record it is our duty to do so.

As to the amount of the plaintiff's loss, or the value of the property destroyed by the mob, there is absolutely no contradiction. The testimony of the witness William A. Roebuck shows the value of the stock destroyed was \$9,066.95, and that the damage to the building was \$183.25, making an aggregate of \$9,250.20.

Under the statute appellant could only recover three-fourths of this amount, or the sum of \$6,937.65, which we

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think it is entitled to, and judgment will therefore be rendered in this court in favor of appellant and against appellee for the sum of \$6,937.65 damages, and for costs of suit as well in this court as in the court below.

Judgment of the Circuit Court reversed and final judgment for appellant rendered in this court.

DIBELL, J., took no part.

FINDING OF FACTS TO BE MADE A PART OF THE JUDGMENT.

We find as a fact that appellant is a corporation, duly organized under the laws of this State, for the purpose of mining and selling coal and other minerals.

That the city of Spring Valley, appellee, is a municipal corporation duly organized under the general laws of this State.

That on the night of July 6, 1894, a mob, composed of three or four hundred persons, riotously assembled in the city of Spring Valley, and made an assault upon property owned by appellant, then and there being within the corporate limits of said city and not in transit, and destroyed personal property belonging to appellant and in its possession to the amount of \$9,066.95, and did damage to the real estate of appellant in which said personal property was stored, to the amount of \$183.25.

We further find as a fact that such destruction and damage to appellant's property by said riotous mob was not occasioned, or in any way aided, sanctioned or permitted by the carelessness, neglect or wrongful act of appellant, its agents, officers or servants, but we find as a fact that appellant, its agents, officers and servants used all reasonable diligence to prevent such destruction and damage.

We further find as a fact, that within thirty days after the damage to its property and the destruction thereof as above found, appellant served upon the proper officers of appellee, due notice of its claim for damages as required by the statute under which this suit was brought, and that

this action was commenced within twelve months after such destruction and injury occurred.

We further find as a fact, three-fourths of the value of the property of appellant so damaged and destroyed, is the sum of \$6,937.65, as to which there is no contradictory evidence.

It is therefore ordered and adjudged that the judgment of the Circuit Court of Bureau County herein, against appellant and in favor of appellee, be, and it is hereby, reversed and set aside, and that said appellant, the Spring Valley Coal Company, do now have and recover of and from said appellee, the city of Spring Valley, said sum of \$6,937.65 so as aforesaid by this court found to be its damages, together with its costs in this court, and in the court below, to be taxed, the same to be paid in due course as in case of other judgments against municipal corporations.

72	640
174	140

72	640
80	285

72	640
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100	252
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100	258
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100	820
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First National Bank of Joliet v. Illinois Steel Company et al.

1. **MORTGAGES—Deficiency—Rents and Profits During Time Allowed for Redemption.**—If the amount realized at a sale under a mortgage does not pay the mortgage debt, and the mortgage itself provides for a resort to the rents and profits during the redemption period, such provision will be enforced in favor of the mortgagee as a valid contract upon proper application by him.

Foreclosure.—Appeal from the Circuit Court of Will County; the Hon. DORRANCE DIBELL, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed December 17, 1897.

GEORGE S. HOUSE, attorney for appellant.

E. PARMALEE PRENTICE and GARNSEY & KNOX, attorneys for appellee Illinois Steel Company.

A person may contract with reference to the use of property and the receipts of its rents and profits pending redemption.

Every kind of interest in real estate may be mortgaged if it be subject to sale and assignment. It does not matter whether it be remainder or reversion and contingent interest, or a possibility coupled with interest, if it be an interest in the land itself. Jones on Mtgs., Sec. 136.

A mortgage may be made of rents due under a lease, and although a right of entry be given to the mortgagee, the mortgage is a mere security like any other mortgage of real estate, and the mortgagor remains the real owner until the foreclosure. Ib. 140; Van Rensselaer v. Dennison, 35 N. Y. 393.

The doctrine is understood to be that everything which may be considered as property, whether, in the technical language of the law, denominated real or personal property, may be the subject of mortgage, as advowsons, rectories, tithes. Reversions and remainders being capable of grant from man to man, and possibilities also being assignable, are mortgageable, a mortgage being only an additional assignment. Rents and also franchises may be the subject of a mortgage. Curtis v. Root, 20 Ill. 522.

Rent is an incorporeal hereditament. 3 Kent's Com., 401, 403.

An agreement or contract relative to rents, refers to a chattel real, and is to be executed and recorded in the same way as conveyances of land, and persons dealing with the subject-matter are bound to take notice of a conveyance affecting any chattel real in the same way and to the same extent as if the instrument was one relative to lands or tenements. Knapp v. Jones, 143 Ill. 375.

From these authorities it would seem to follow that a disposition of the rent of the property pending redemption, after a mortgage sale, would be enforced by the courts as a valid contract, and applied in favor of the person who should show himself to be under his contract equitably entitled to its benefit, and indeed this exact question has been presented in New York, where it is held that a covenant in a mortgage, that on beginning proceedings for foreclosure the mortgagee shall have a right to a receiver of

the rents and profits for his benefit, will be enforced by the court. Bryson v. James, 55 N. Y. Superior Ct. 374.

MR. PRESIDING JUSTICE CRAUTREE DELIVERED THE OPINION OF THE COURT.

The appeal in this cause is prosecuted from a decree rendered by the Circuit Court in the case of The First National Bank of Joliet v. Ashley Wire Co. et al., and the bill of Illinois Steel Co. v. Ashley Wire Co. et al., for the foreclosure of its mortgage on the plant of the latter. The two causes were by agreement of parties consolidated and heard together as one case, in the disposing of both matters, with the decree entered in the cause of the said First National Bank of Joliet v. The Ashley Wire Company.

It appears from the record that on December 26, 1893, the First National Bank of Joliet filed a bill in the nature of a creditor's bill against the Ashley Wire Company, in which it was averred that the complainant had recovered a judgment against the wire company for \$12,657.77 upon which an execution had been issued and returned "No property found," and which judgment remained wholly unsatisfied; that said wire company had mortgaged its plant to the Illinois Steel Company to secure an indebtedness of \$67,240.24; that one John Y. Brooks had obtained a judgment against said wire company for \$11,090, upon which an execution had been issued and levied upon all the tangible personal property of said wire company liable to seizure on execution; that the sheriff had not yet sold said personal property, which was worth about \$5,000 and wholly inadequate to satisfy the execution of said Brooks. The bill alleged the insolvency of the wire company, and averred that for many months its manufacturing operations had been suspended, and its plant permitted to remain idle; that its plant was very valuable and liable to deteriorate, which should not be allowed; that it had no means with which to pay insurance or taxes, or to protect and preserve the property, or preserve and collect its equitable assets, and that for want of such means, its officers were little

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inclined to care for its interests. It was also averred that the personal property levied on by Brooks could not be sold at execution sale without ruinous sacrifice, and ought to be sold at private sale; and to that end and for the collection and preservation of the company's assets, the appointment of a receiver was necessary in the interests of the Ashley Wire Company and all its creditors, including the complainant.

Notwithstanding the fact that the Illinois Steel Company was the principal creditor of the Ashley Wire Company, and the holder of an incumbrance on its entire plant, it was not made a defendant to this bill.

The defendants to the bill entered their appearance in the cause, and such proceedings were had that on the day the bill was filed, said 26th day of December, 1893, one George W. Bush was appointed receiver, and the sheriff was ordered to turn over to him all the personal property levied on under the Brooks execution, and the receiver was ordered to take possession of all the real estate and personal property, books of account, bills receivable, etc., procure proper insurance, and to "pay all taxes and assessments legally levied upon said real estate."

On February 19, 1894, the receiver having no money with which to pay taxes, presented a petition to the court asking authority to borrow money to pay such taxes and to issue certificates therefor, and that the certificate for money to pay the personal property tax be made a first lien upon the personal property, and that the certificate for money to pay taxes on the real estate be made a first and prior lien upon the real estate. An order was entered February 20, 1894, denying, without prejudice, the petition as to the personal tax, but authorizing the receiver to pay the real estate taxes, and for that purpose to borrow the money and issue his certificate therefor, which certificate was by said order declared a first and prior lien upon the real estate of the Ashley Wire Company.

Prior to this time the Illinois Steel Company had not taken any legal proceedings against the Ashley Wire Com-

pany, but on March 7, 1894, it filed a bill to foreclose its mortgage on the plant of said last mentioned company, which was made a defendant, together with the Will County National Bank, the First National Bank of Joliet, John Y. Brooks and George W. Bush, the receiver theretofore appointed, who was made a party defendant by leave of the court.

After this foreclosure suit was commenced, and on July 12, 1894, the Illinois Steel Company loaned to said Bush as such receiver, the sum of \$2,037.82 with which to pay taxes, and obtained therefor a receiver's certificate, reciting that it was issued under said order of February 26, 1894, and that it was by the terms of said order made a first and prior lien upon all the real estate of said Ashley Wire Company, and that the money loaned thereon was to be used exclusively to pay the said taxes.

The mortgage sought to be foreclosed by the Illinois Steel Company was dated, acknowledged and filed for record, July 19, 1893, and contained a provision that "Upon the filing of any bill to foreclose this mortgage, in any court having jurisdiction thereof, such court may appoint A. F. Knox, or any proper person receiver, with power to collect the rents, issues and profits arising out of said premises during the pendency of such foreclosure suit, and until the time to redeem the same from any sale that may be made under any decree foreclosing this mortgage shall expire; and such rents, issues and profits when collected may be applied toward the payment of the indebtedness and costs herein mentioned and described." Answers were filed by the First National Bank and the wire company, and upon final hearing a decree was entered finding the equities for the complainant, the Illinois Steel Company, the amount due under its mortgage, and ordering a sale of the property in default of payment. In pursuance of this decree a sale of the premises was made by the master, who reported a deficit or unpaid balance under the said decree, of \$5,316.50, for which deficiency a decree was entered against the Ashley Wire Company with interest at five per centum from March 8, 1895, and execution therefor was ordered.

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The Illinois Steel Company afterward, on April 10, 1895, filed its petition in the foreclosure suit, setting up the foregoing facts, and the provisions of the mortgage creating a charge on said rents until the expiration of the time of redemption, and also the fact of said deficiency decree, and praying for the appointment of a receiver to collect said rents and profits, and apply them on said deficiency. On the hearing of said petition on June 20, 1895, the court declined to appoint a new receiver, but ordered that the receivership theretofore existing in the case of the bank against the Ashley Wire Company be extended to include the property and effects of said wire company, and said Bush as such receiver was directed to receive the rents and profits of the plant of said company in the foreclosure cause, to be held by said receiver for the benefit of all persons who should thereafter be ascertained to be entitled thereto, subject to the further orders of the court. It appears that the receiver, under the first order of the court appointing him, leased the plant of the Ashley Wire Company for a term of one year from December 1, 1894, at a rental of \$6,000 per annum, payable monthly in advance, by a written lease, which contained a provision from an additional term of one year on the same terms, at the option of the lessee.

At the foreclosure sale, the Illinois Steel Company became the purchaser, and the premises not having been redeemed therefrom, it obtained on June 9, 1896, a master's deed therefor, and applied to the court, in the foreclosure suit, for an order giving it the possession of the property. The tenant appeared and resisted the application, but on a hearing in November, possession was ordered to be surrendered to the Illinois Steel Company at midnight of November 30, 1896, the date of the expiration of the tenant's lease.

The receiver collected in all for rents on the plant of the Ashley Wire Company the sum of \$12,000, out of which he disbursed for taxes and necessary expenses the sum of \$7,626.52, leaving a balance in hands of the receiver of \$4,373.48.

The controversy in this case arises over the disposition

and distribution of this balance, the chief subject of contention being concerning that portion of the rent accruing between April 10, 1895, and June 9, 1896, it being conceded by appellant that the Illinois Steel Company is entitled to the rents from June 9, 1896, the date it obtained its deed to the property, and the steel company making no claim to the rents accruing prior to April 10, 1895, the date on which it filed its petition for a receiver in its foreclosure suit.

It is insisted on behalf of appellant that, by the foreclosure sale under the decree, the mortgage of the Illinois Steel Company was absolutely extinguished, and that thereafter no rights or equities remained to be enforced thereunder by the steel company or any one else; that after such sale the steel company had but two relations to the wire company, viz.: First, as the holder of the certificate of purchase, and second, as a judgment creditor under its deficiency decree. Under the case of *Davis v. Dale*, 150 Ill. 239, we think it is clear that the Illinois Steel Company can have no claim to rents or payment of taxes during the redemption period simply by virtue of its certificate of purchase, but it does not necessarily follow that under the clause contained in the mortgage creating a charge on the rents and profits during that period, said company would not have the right to any benefit thereof. By that clause or provision in the mortgage, we think the entire debt secured by it was made a charge on the rents until the right to redeem from any foreclosure sale had expired, and the appointment of a receiver was authorized to collect such rents and apply them toward the payment of the debt and costs. No reason is perceived why this was not a valid and binding contract. No authority is cited which, in our judgment, shows its invalidity. Certainly the parties had the power to make such a contract, and by its terms it violates no rule of law; why, then, should not a court of equity enforce it? Counsel for appellant seem to argue against the validity of this provision in the mortgage, on the ground that "It is against the policy of the law that the mortgagor may, in advance, stipulate away the humane provision the law has established

for his security and protection." We are not prepared to give our acquiescence to this proposition. We see no more illegality in enforcing a mortgage on rents and profits arising out of property than in the case of a mortgage upon the property itself. Rents and profits are just as much property as the estate out of which they arise, and are equally the subject of mortgage or sale. The cases are numerous in which it has been so held. But counsel for appellant, while conceding this to be the law, insists that in the mortgage under consideration, the rents and profits did not constitute any part of the subject-matter of the grant, but that the clause in the mortgage referring to rents and profits rested for its enforcement, or was dependent upon, the sound discretion to be exercised by a court of equity. We are of a different opinion. We think that provision of the mortgage created a charge on the rents and profits for the payment of any portion of the mortgage debt which might remain unsatisfied during the whole period allowed by law for redemption. The case of *Oakford v. Robinson*, 48 Ill. App. 270, is an authority in point, and while counsel for appellant strongly urges that this case was erroneously decided, we are satisfied as to the correctness of the conclusions reached. The cases of *Seligman v. Laubheimer*, 58 Ill. 124, *Ogle et al. v. Koerner et al.*, 140 Id. 170, and *Davis v. Dale*, 150 Id. 239, are cited as supporting the proposition that a foreclosure sale extinguishes the mortgage and renders it *functus officio*; and no doubt the court does so hold in those cases, and properly too, when applied to the facts then before the court. But the question before us was not raised or decided in any of the cases above cited, and there is nothing in them which militates against the proposition that if the sale does not pay the mortgage debt, and the mortgage itself provides for a resort to the rents and profits during the redemption period, that such provision of the mortgage may be enforced in favor of the mortgagee. No authority has been cited on either side which can be said to be squarely in point, unless it be the case of *Oakford v. Robinson*, *supra*; and we think, upon

principle and the soundest rules of equity, appellee had the right to have the benefit of this portion of the contract enforced in its favor. Clearly the object and purpose of the mortgage was not accomplished until the entire debt sought to be secured thereby was fully paid. No rights of the appellant are violated by this holding. The mortgage was on record long before appellant obtained its judgment or secured the appointment of a receiver, and it had full notice that the steel company was entitled to a prior lien upon the rents and profits of the Ashley Wire Company plant, in the event that a resort to them was necessary to pay its mortgage debt to appellee. We find nothing in the record to show that the steel company did not act in good faith, and bid off the property at a foreclosure sale for all it was reasonably worth; and hence the argument, that before it can be entitled to the relief prayed for under the provision of the mortgage under consideration, it must come into court with clean hands, would seem to be without force. Even granting, for the sake of argument, that this clause of the mortgage only gives the mortgagee a right to its enforcement, in the sound discretion of a court of equity (which, however, we do not concede as a matter of law), still we do not perceive in what manner the discretion has been abused in the case now before us. We feel constrained to hold, notwithstanding the very able and ingenious arguments of counsel for appellant, that the court below decided the questions before it on correct principles, and properly adjudicated the rights of the parties.

It is not contended by counsel for appellant that the court erred in its judgment as to the amounts to be paid to the respective parties, provided its decree proceeded upon correct principles, and hence we do not deem it important or necessary to examine in detail the figures arrived at.

Serious complaint is made by counsel for appellee in their argument that the Circuit Court did not give it all it was entitled to under the proofs, but no cross-errors are assigned, as they say, because, under the decree as entered, the funds in the hands of the receiver will be exhausted, and they

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could derive no benefit from a reversal of the decree. The decree appealed from gave the appellant, substantially, the benefit of all rents collected by the receiver (less taxes and necessary expenses) prior to the time the receivership was extended for the benefit of appellee, the Illinois Steel Company, which was April 10, 1895, and gave to appellee the benefit of all rents collected after that date, less taxes and necessary expenses. We think this action of the court was entirely proper, and must be affirmed. No point is made in the argument against the decree of the court concerning the costs; and upon a very careful examination of the record, and finding no error therein, we think the decree must be affirmed.

DIBELL, J., took no part.

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173 349

1. CORPORATIONS—*Stock of, May be Pledged by Delivery of Certificate.*—Under Sec. 52, Chap. 77 R. S., a delivery of a certificate of stock of a corporation in good faith, to one who advances money on the security thereof, is sufficient to protect the holder as against executions or attachments against the pledgor, to the extent of the debt such stock is delivered to secure, even though there be no transfer in writing or upon the books of the corporation.

Injunction.—Error to the Circuit Court of Kane County; the Hon. HENRY B. WILLIS, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed December 17, 1897.

N. J. ALDRICH and THEODORE WORCESTER, attorneys for plaintiff in error.

R. G. MONTONY and F. M. ANNIS, attorneys for defendants in error Mary A. Gilbert and Isaac Potter, Adm'rs.

Incorporeal property being incapable of manual delivery

can not be pledged without a written transfer of the title. Debts, negotiable instruments, stock in incorporated companies and choses in action generally are pledged in that mode. Such transfer of title performs the same office that the delivery of possession does in case of a pledge of corporeal property. 2 Thompson's Corporations, Sec. 2622; Brewster v. Hartley, 37 Cal. 15; Wilson v. Little, 2 N. Y. 443; Jewett v. Warren, 12 Mass. 300; Bowman v. Wood, 15 Mass. 534; Dewey v. Bowman, 8 Cal. 145; First Natl. Bank of Mendota v. Smith, 65 Ill. 44.

"Repeated efforts have been made to have certificates of stock declared negotiable paper, but they have been unsuccessful. Such a certificate is not negotiable either in form or character." Hammond v. Hastings, 134 U. S. 403.

A share of stock is defined to be a right which its owner has in the management, profits and ultimate assets of the corporation. Cook on Stock and Stockholders, Sec. 5.

A share of stock is a species of incorporeal personal property assignable at common law. It is neither a chattel nor a chose in action. Lowell on Transfer of Stock, Sec. 9.

"Shares in incorporated companies, such as banks, insurance companies, bridges, turnpikes and railroads have long been considered in this commonwealth as property of a definite and important character, with many of the qualities of visible, tangible personal property, having a value, and as capable of appreciating as vessels or merchandise or other personal chattels. But it is not visible or tangible and therefore not, like merchandise, capable of passing by manual delivery. A nearer analogy perhaps is that of a chose in action capable, like this, of being assigned in equity by a delivery over of the certificate, which is the assignor's muniment of title, with an assignment duly executed, transferring to the assignee all the assignor's right, title and interest." Fisher v. Essex Bank, 5 Gray, 376; Pinkerton v. Railroad Co., 42 N. H. 424; People's Bank v. Gridley, 91 Ill. 457.

"When any officer holding an execution against any one in whose name shares of stock stand on the books of the com-

pany, delivers to a proper officer of a corporation an attested copy of such execution, the property from the moment of such delivery is to be considered as seized on execution, and from that moment the corporation is to be considered as in possession for the sheriff, although the sheriff has not yet the possession of anything representing the property." *People v. Goss & P. Mfg. Co. et al.*, 99 Ill. 364.

"The title to stock is created by registry in the books of the corporation. The certificate is not the stock itself but only evidence of the ownership of the stock. It has value only as such evidence, and apart from the shares it represents, it is utterly worthless." *Colton v. Williams*, 65 Ill. App. 466.

Even where there was a written declaration attached to the certificate that the stock was thereby pledged for the debt described, an unregistered transfer was held not good against creditors. *Platt v. Hawkins*, 43 Conn. 139.

An entry by the clerk of a corporation upon the deed of assignment that it had been received for record was not sufficient to protect the stock from attachment as the property of the assignor. *Northrop v. Newton, etc.*, *Turnpike Co.*, 3 Conn. 544.

Whether the transfer of the certificate of stock, accompanied by a power of attorney indorsed in blank, carries the full title against outside equities and attaching creditors, is a question concerning which there has been frequent controversy arising chiefly from the construction of statutes, charters and by-laws regulating the transfer. * * * Most States have by statute provided for the transfer of stock on the books of the corporation, or have allowed it to be transferred on the books in a manner prescribed in the charter or by-laws of the corporation.

The courts of the most prominent commercial States, as New York, New Jersey, Pennsylvania and some others, recognizing the importance of making the certificate indorsed in blank as nearly negotiable as possible, have declared that the registry on the books of the company, so provided for by statute, charter, or by-law, is for the company's benefit

alone, and that a blank transfer of a *bona fide* holder for value is good against anybody but the corporation. 18 Am. & Eng. Ency. of Law, 615.

The courts of other States have, however, just as strongly held that a statute, charter, or authorized by-law provision that stock shall only be transferred on the books of the corporation, is to show to all the world where the legal title is, and that therefore an unregistered transfer is not good against creditors or assignor. Parrott v. Byers, 40 Cal. 614; Weston v. Bear R. & A. W. & M. Co., 5 Cal. 186; 6 Cal. 425; Strout v. Natoma W. & M. Co., 9 Cal. 78; Naglee v. Pacific Wharf Co., 20 Cal. 529; People v. Elmore, 35 Cal. 653; Winter v. Belmont Mining Co., 53 Cal. 428; Rock v. Nichols, 3 Allen, 342; Blanchard v. Dedham G. L. Co., 12 Gray, 213; Marlborough Mfg. Co. v. Smith, 2 Conn. 579; Northrop v. Curtis, 5 Conn. 246; Oxford Turnpike Co. v. Bunnel, 6 Conn. 552; Dutton v. Conn. Bank, 13 Conn. 493; Shipman v. Ætna Insurance Co., 29 Conn. 245.

MR. PRESIDING JUSTICE CRABTREE DELIVERED THE OPINION OF THE COURT.

Mary A. Gilbert and Isaac Potter, as administratrix and administrator of the estate of Horace Gilbert, deceased, exhibited their bill in equity against plaintiff in error and other defendants, to restrain said B. A. Rice from selling thirty shares of the capital stock of the "Old Second National Bank of Aurora," and twenty shares of the capital stock of the "Aurora Silver Plate Manufacturing Company." Plaintiff in error had obtained a judgment by confession against his father, one F. B. Rice, to an amount exceeding \$5,000, upon which executions were issued and levied upon the stock in controversy. Said Gilbert and Potter claiming that this stock belonged to, and was the property of the estate of said Horace Gilbert, deceased, filed their bill for an injunction as above stated.

It appears from the evidence that on or about March 15, 1892, said F. B. Rice became indebted to said Horace Gilbert (then in his lifetime, but now deceased), in the sum of

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five thousand dollars, and to secure the same said F. B. Rice executed and delivered to said Horace Gilbert a promissory note for that sum, bearing said last mentioned date, and due one day after date with interest at seven per cent per annum; and that to secure the payment of said note, said F. B. Rice transferred and delivered to said Gilbert, stock certificate No. 67 for thirty shares of the capital stock of Old Second National Bank of Aurora, and also six certificates covering twenty shares of the capital stock of the Aurora Silver Plate Manufacturing Company, being the same stock in controversy in this suit. All of this stock then stood in the name of said F. B. Rice on the books of the bank, and the manufacturing company respectively, and it is not shown, nor is it claimed, that these certificates of stock were ever indorsed or assigned by said F. B. Rice, in writing, nor was there ever any transfer made upon the books of the bank or manufacturing company. The certificates themselves, however, were delivered to said Horace Gilbert, and some months before the issue of the executions above mentioned he had served written notice upon the bank and the manufacturing company that he held the stock in controversy as collateral security, and requested that an assignment or transfer be accordingly made on the books of the different corporations, showing the fact. This was never done, and so the matter stood until the death of said Horace Gilbert, whose administrators held the \$5,000 note entirely unpaid, and also held possession of the certificates of stock, at the time of the issue of the executions in favor of plaintiff in error.

On a hearing in the court below, on bill, answers of the several defendants, replications, evidence and proof taken, a decree was entered finding the equities for the complainants, and enjoining plaintiff in error and the officers holding the executions, from proceeding with the sale. The court further found upon the evidence, that there was due the complainants upon said promissory note, the sum of \$5,300.13, and decreed that unless the defendants, or some of them, should pay that amount to the complainants within

forty days from the date of the decree, then in default of such payment the stock in controversy, or so much thereof as might be necessary to realize the amount due complainants, and the costs, be sold by the master in chancery to the highest bidder, and that on such sale being made, the master execute assignments of such certificates of stock to the purchasers, and that the bank and manufacturing company (who were parties defendant) should transfer such stock on their respective books. And that out of the proceeds of such sale, the master pay the complainants the amount found due upon said note, with legal interest, and bring the surplus, if any, into court.

Plaintiff in error being dissatisfied with this decree, brings the cause to this court and insists upon a reversal, assigning fourteen different errors. But the principal controversy centers around the contention of plaintiff in error, that because there was no written assignment of the certificates of stock, and no transfers upon the books of the corporations issuing the same, there was no such transfer of the title to the stock as prevented plaintiff in error from levying upon and selling the same as the property of the judgment debtor, F. B. Rice, in whose name the stock stood upon the books of the corporations.

There is no doubt that prior to the amendment of Sec. 52, Chap. 77 of the Revised Statutes, passed in 1883 and in force July 1, 1883, such contention must have prevailed under the law as laid down by the Supreme Court in *People's Bank v. Gridley*, 91 Ill. 457. But since said amendment, which we think was made for the benefit of pledgees of stock in corporations, we hold, that by its terms, a delivery of the certificates of stock in good faith, to one who advances money on the security thereof, is sufficient to protect the holder as against executions or attachments against the pledgor, to the extent of the debt such stock is delivered to secure, even though there be no transfer in writing or upon the books of the corporation.

It is our duty to give some meaning to this amendment, and unless the construction we have placed upon it be the

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correct one, we are at a loss to see what purpose it has accomplished.

If it is to be held notwithstanding the amendment, there must still be a written assignment of the certificates of stock and a formal transfer upon the books of the corporation in order to protect the pledgees, then the amendment is meaningless and amounts to nothing. We are not prepared to so hold.

As the decision of this question disposes practically of the entire controversy in the case, we deem it unnecessary to take up in detail the numerous errors assigned upon the record, because, if the Circuit Court held correctly upon this point there was no error in the other rulings which were dependent thereon.

We are of the opinion the decree was right, and it will be affirmed.

Mexican Amole Soap Co. v. William E. Clarke.

1. FRAUD—*Vitiates all Contracts.*—Fraud vitiates all contracts between the parties to it.

2. SAME—*Defense in Law and Equity.*—The defense of fraud can be availed of in a court of law as well as in a court of equity.

3. SAME—*Right to Avoid a Contract.*—Where a person by the false representations of another as to his average monthly sales while in the service of a former employer, and like false representations as to the amount of salary he received, is induced to enter into a contract of employment against his interest, and which he would not otherwise have done, he has a right to avoid the contract when he learns the real truth.

4. EVIDENCE—*Of False Statements Competent.*—A salesman induced a merchant, by false statements as to the amount of sales made by him while in the service of a former employer and the amount of salary paid to him, to enter into a contract of employment which he would not otherwise have done. In an action for services after his discharge, it is competent for the merchant to show that such statements were false, and that by reason of them he was induced to enter into the contract of employment.

5. CONTRACTS—*Inquiry as to Truth of Statements.*—Where a party makes statements to another for the purpose of inducing him to enter into a contract, and requests that such statements be accepted as the

72	655
74	79
78	92
72	655
81	392
81	577

72	655
97	371

truth, he can not, in an action upon the contract, insist that the party should have made inquiry as to the actual truth of such statements.

6. *PRACTICE—Informal Verdicts.*—Where the verdict of a jury omitted the word "dollars," but the clerk of the court read it when presented in court and in the presence of the jury with the omitted word inserted, and the court therefore discharged the jury, it will be regarded as the verdict of the jury as read by the clerk.

Assumpsit, on a contract of employment. Appeal from the Circuit Court of Peoria County; the Hon. THOMAS M. SHAW, Judge, presiding. Heard in this court at the May term, 1897. Reversed and remanded. Opinion filed December 17, 1897.

ARTHUR KEITHLEY, attorney for appellant.

The common law courts may entertain jurisdiction of questions of fraud, and a conveyance, whether by deed from an individual, or by patent from the government, although executed with all the forms of law, when obtained in fraud of the rights of others, may, in an action of ejectment, be disregarded by the court as void, at the instance of the injured party or those holding under him. *Rogers v. Brent*, 5 Gilman, 574; *Douglas v. Hartzell*, 15 Ill. App. 251.

Where the contract has been partially executed by a party before he discovers the fraud which has been practiced upon him, he is then in a position to elect the course he will take, and in this his own interest is his only guide. If he decides he can make more by affirming the contract than by rescinding, he has the right to do so, reserving his claim for damages arising from the fraud, either by a separate action or claiming them by way of recoupment, if sued upon the contract. This course he may pursue, and it is the doctrine of this and other courts, that recoupment will be allowed whenever an action for damages can be sustained, and thus avoid circuitry of action, and courts will favor recoupment rather than drive a party to a separate action. *Peck v. Brewer*, 48 Ill. 54.

A willful misrepresentation as to the income derived from the royalty of a certain patent, which induced a land owner to exchange his interest for a one-half interest in such royalty, is sufficient evidence of fraud and deceit to set aside the sale. *Crosland v. Hall*, 33 N. J. Eq. 111.

ISAAC C. EDWARDS, attorney for appellee.

Fraud is never presumed, but is a question of fact, and must be proved by the party alleging it the same as any other fact. That being true, it is for the jury to construe the evidence, and give it such weight and effect as in their judgment it is justly and fairly entitled to; and in the absence of anything showing passion or prejudice on their part, or indicating that they were misled, an Appellate Court will not ordinarily interfere with their finding. *Powell v. Kelley*, 17 Ill. App. 256.

An employer has no right to discharge his employe merely because the relation is not liable to be a profitable one. *Jaffray v. King*, 34 Md. 217; *Dugan v. Anderson*, 36 Md. 567; *Greene v. Washburn*, 7 Allen (Mass.) 390.

The fact that the efforts of a traveling salesman to make sales are not very successful, and that another person who is afterward employed in the same capacity succeeds in making larger sales, is no evidence that he did not serve his firm faithfully and to the best of his ability. *Hamill v. Foute*, 51 Md. 419.

MR. PRESIDING JUSTICE CRABTREE DELIVERED THE OPINION OF THE COURT.

Appellee brought suit against appellant to recover a balance he claimed to be due him for salary, under a written contract, of which the following is a copy :

“PEORIA, ILL., August 5th, 1895.

We hereby agree to employ W. E. Clarke for the term of one year as traveling salesman at a salary of \$80.00 per month and expenses. MEXICAN AMOLE SOAP CO.”

Appellee commenced work under this contract August 22, 1895, and continued so working until January 1, 1896, when he was discharged by appellant, and afterward brought this suit.

The cause was tried by a jury who returned a verdict in favor of appellee for \$509.33, from which the plaintiff remitted \$29.33, and the court entered judgment against appellant for \$480 after overruling a motion for a new trial.

The defense interposed by appellant was, that the contract was procured by the false and fraudulent representations of appellee upon which it relied in making the contract; and that it was justified in discharging him after it ascertained the truth.

Appellee had been in the employment of the Des Moines Soap Works as a traveling salesman, selling soap in a portion of the State of Iowa. He applied to appellant for employment in a like capacity, and represented that his average sales for the Des Moines company were from \$1,500 to \$1,800 per month, and that the salary paid him by that company was \$75 per month and expenses. The proofs showed that his average sales for the Des Moines company were but about \$579 per month. During the time he worked for appellant, that is from August 22, 1895, to January 1, 1896, he sold in all only \$607.06 worth of soap, and even this amount seems to have included some orders never received by appellant, while he was paid for salary and expenses during the same period of time, \$361.72.

On the trial appellant offered to show that appellee, while working for the Des Moines company, was paid as salary only \$50 per month, and that his statement that his salary was \$75 per month was false. The court refused to admit this evidence and in this ruling we think the court erred. If by appellee's false representations as to his average monthly sales while with the Des Moines company, and like false representations as to the amount of salary he was receiving, appellant was induced to enter into a contract it would not otherwise have made, we think it would have a right to avoid the contract for fraud, and discharge appellee when it learned the truth, on the principle that fraud vitiates all contracts between the parties to it. *Allen et al. v. Hart*, 72 Ill. 104.

And the defense can be availed of as well in a court of law as in a court of equity. *Jamison v. Beaubien*, 3 Scam. 113; *Rogers v. Brent*, 5 Gilm. 574; *Wing v. Sherrer*, 77 Ill. 200.

The case of *Hauk v. Brownell, et al.*, 120 Ill. 163, and

other cases of like character cited by appellee, are not in point as against this proposition. While it may be true the parties were dealing at arm's length, yet the representations made by appellee were as to facts within his own knowledge and as to which appellant had none. Mr. Masker, the secretary of appellant, testifies that in the conversation when the alleged false representations were made, and which resulted in the contract, he proposed to write to the Des Moines company and see if they verified his statements, but to this appellee objected on the ground that if the Des Moines company knew he was trying to get another position they would discharge him. Appellee nowhere denies this, nor does he deny that he made the false representations concerning his sales or salary with the Des Moines company. Hence the argument comes with poor grace from him now, that appellant was dealing with him at arm's length and could have ascertained the truth or falsity of his statements had it exercised due diligence! At his own request no further inquiry was made, but his own statements were accepted as the truth, and relied upon by appellant in making the contract. This clearly appears from Mr. Masker's testimony, and appellee does not pretend to contradict him.

The defendant below asked the court to give to the jury the following instruction, viz.: "If the jury believe from the evidence that the plaintiff procured the contract sued on in this case from the defendant by fraud, then the defendant had a right to discharge the plaintiff, and he can not recover in this action." Had the instruction been limited to the right to discharge for the fraud, we think it would have been entirely proper, but we are not prepared to hold that appellee might not recover for the time actually worked. While appellant would have the right to discharge on learning the truth, yet it could not retain appellee in the service and refuse to pay him for the time he was employed after it knew all the facts. The instruction above quoted, and one other on the same line refused by the court, ignored the right to recover for the time actually served and therefore it was not error to refuse them.

The jury returned into court the following verdict: "We, the jury, find the issues for the plaintiff and assess the damages at five hundred nine and thirty-three one-hundredth (509.33)," thus leaving out the word "dollars."

But the clerk read the verdict in open court before the jury were discharged, and in their presence, as though the word "dollars" were inserted therein. Thereupon the court discharged the jury, but in the afternoon and against the objection of appellant, called them together again and had them correct their verdict so as to contain the word "dollars." This action of the court is complained of as error. But we think the reading of the verdict in the presence of the jury as though the word dollars were inserted, thus making a verdict in favor of plaintiff for \$509.33 was sufficient. While under our practice the verdict is usually reduced to writing and signed by the jury, yet it may be delivered *ore tenus* by the foreman. "Whatever may be pronounced as the verdict of the jury in open court, whether in writing or verbally through the foreman, is to be regarded as the verdict of the jury." *Griffin v. Larned*, 111 Ill. 432. The verdict having been read to the jury as \$509.33 and they having assented to it, made it a complete and valid verdict, and afterward calling the jury together again to correct it, while unnecessary, was harmless. There was no error in this action of the court.

An effort was made by appellant on the trial to prove that it had sent to appellee a check for \$70.05 in full of everything, as per a previous letter. The court refused the offer and this is assigned as error. If the proofs had shown that this letter and check were actually sent to and received by appellee and retained by him, he would be bound thereby and could not afterward claim a greater sum. The retention of the check would have barred any further claim under the authority of *Ostrander v. Scott*, 161 Ill. 339. But the proper proof was not made so as to connect the check with the letter referred to as the "previous letter," and to show the receipt of the check, and hence the court committed no error in refusing the offer so far as it was made.

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But for the error in refusing to allow proof as to the salary appellee was receiving from the Des Moines company and because the verdict is against the evidence, we think the judgment must be reversed and the cause remanded for a new trial under proper evidence and instructions, in accordance with the views hereinabove expressed.

Reversed and remanded.

Charles W. Cottew v. John Betz.

1. WITNESSES—*Credibility of, for the Jury.*—The question of the credibility of witnesses is one solely for the consideration of the jury, who see and hear them testify.

2. VERDICTS—*On Conflicting Evidence.*—Where the testimony is conflicting, if there is evidence sufficient, if believed by the jury, to sustain their verdict, it will not be disturbed unless it is apparent that they have been actuated by passion or prejudice.

Assumpsit, for goods sold, etc. Appeal from the Circuit Court of La Salle County; the Hon. CHARLES BLANCHARD, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed December 17, 1897.

FOWLER BROTHERS, attorneys for appellant.

WIDMER & WIDMER, attorneys for appellee.

MR. PRESIDING JUSTICE CRABTREE DELIVERED THE OPINION OF THE COURT.

This was an action of assumpsit, brought by appellee against appellant, to recover a balance claimed to be due on an open account, for goods sold and delivered. There was a trial by jury, resulting in a verdict in favor of appellee for \$335.76. Appellee entered a *remittitur* as to \$48, which being done the court overruled a motion for new trial, and rendered judgment for \$287.76.

The only controversy in the case is as to the amount of a certain payment made by appellant, on April 18, 1895; appel-

lant claiming to have paid on that date \$450, while appellee insists the amount was only \$150. Upon the trial appellant produced a receipt for \$450, dated April 18, 1895, signed by appellee, and now contends that the evidence on the part of appellee was not sufficient to overcome it.

As to the amount of this payment there was an irreconcilable conflict in the evidence. If the jury believed the testimony of appellant, the payment was \$450. If, on the other hand they believe the appellee, corroborated as he was to some extent by other witnesses and circumstances in the case, then the payment was but \$150. The question of the credibility of the witnesses was one solely for the consideration of the jury, who saw them and heard them testify.

There was evidence, sufficient if believed by the jury, to warrant their verdict, and we think this case falls within the rule so often announced by the courts of this State, that when there is evidence from which the jury could properly find their verdict, it will not be disturbed, when the evidence is conflicting, even though it might seem to the appellate tribunal to preponderate against the verdict, unless it is apparent that the jury have been actuated by passion or prejudice. *Chicago, R. I. & P. R. R. Co. v. Reidy*, 66 Ill. 43; *Toledo, W. & W. Ry. Co. v. Moore*, 77 Ill. 217; *Plummer v. Rigdon*, 78 Ill. 222.

We can see no just reason for interfering with the verdict of the jury in this case.

We find no error in the rulings of the court on the admission or rejection of evidence, and no complaint is made of the instructions.

Seeing no sufficient reason for interfering with the judgment it will be affirmed. Judgment affirmed.

City of Peoria v. George E. Adams.

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109	49
72	662
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72	662
111	214
111	216

1. **PERSONAL INJURIES**—*Proximate and Direct Result of Negligence.*
—A person can not be held responsible for injuries unless such injuries are shown to be the direct and proximate result of some negligence, or a neglect of some duty imposed upon him by law.

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2. *SAME—Proximate and Remote Causes.*—The test to determine as to whether an injury is the direct or remote result of an act of negligence, is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened, of itself, sufficient to stand as the cause of the misfortune, the other must be considered as too remote.

3. *SAME—Exercise of Due Care for One's Safety.*—Where the plaintiff's declaration showed that a building in which he worked had been for fifteen years in such an unsafe condition as to endanger the lives of people who might lawfully be therein, and he testified that he had worked in such building for two years but had never looked to see whether it was safe or unsafe, *it was held*, that if he knew the building was unsafe he was not in the exercise of due care for his own safety in being there at all.

4. *CITIES AND VILLAGES—Carrying off Surface Water—Rule of Liability.*—The duty of a municipal corporation in providing for carrying off surface water is dictated and measured by the exigencies of the case, and no higher duty is imposed upon such a corporation than upon a private individual under the same circumstances, the rule of liability being the same in both cases.

5. *SAME—Use of Streets for Railroad Purposes.*—A city has a right to allow the use of a street, or a portion thereof, for railroad purposes, and if such use interferes with the natural flow of the water falling thereon it is its duty to provide means for carrying it off, so as to do no additional damage to adjoining property.

6. *SAME—Excessive Rainfall—Responsibility for Damage Done By.*—Where a city has provided sewers or drains of ample capacity to carry off all water likely to fall or accumulate upon the streets on all ordinary occasions it is not guilty of negligence in failing to anticipate and provide for unexpected and extraordinary storms. The rule is that the outlet must be of ample capacity to carry off all the water likely to be in it, but it is not applicable to extraordinary rainfalls, which can not be foreseen, and for damage done by them no one is responsible.

7. *SAME—Failure to Provide Sufficient Sewers to Carry Off Surface Water—Limit of Liability.*—Where a city is guilty of negligence in failing to provide sufficient catch basins and sewers to carry off the surface water, its liability is confined to such injuries as are the proximate or natural result of such negligence.

8. *LANDLORD AND TENANT—Liability of the Owner and Occupant of Premises.*—The general rule is, that the occupant, and not the owner, as such, is responsible for injuries received in consequence of a failure to keep the premises occupied in repair.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Peoria County; the Hon. THOMAS M. SHAW, Judge, presiding. Heard in this court at the May term, 1897. Reversed. Opinions filed December 17, 1897.

WILLIAM V. TEFFT, city attorney, for appellant; W. I. SLEMMONS, of counsel.

The cause of an injury is in contemplation of law that which immediately produces it as its natural consequence; therefore if a party be guilty of an act of negligence which would naturally produce an injury to another, but before such injury actually results, a new and independent force intervenes and causes the injury, the original party is not responsible, even though the injury would not have occurred but for his negligence. *Washington v. Baltimore, etc., R. R. Co.*, 17 W. Va. 190; *Am. & Eng. Ency. Law*, Vol. 16, 446, note.

The test is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened of itself sufficient to stand as the cause of the misfortune, the other must be considered as too remote. *Insurance Co. v. Tweed*, 7 Wall. (U. S.) 44; *Scheffer v. Ry. Co.*, 105 U. S. 249; *Bishop on Non-Contract Law*, Sec. 41-48; *Lewis v. Flint & P. M. Ry. Co.*, 54 Mich. 55; *Seale v. Gulf C. & S. F. Ry. Co.*, 65 Tex. 274.

And the test is, was it a new and independent force, acting in and of itself in causing the injury, and superseding the original wrong complained of, so as to make it remote in the chain of causation. *Pullman Palace Car Co. v. Laack*, 143 Ill. 242; citing *Bishop on Non Contract Law*, Sec. 42, 835-6.

There is no other just or reasonable rule than to determine, in every instance, whether the loss was one which might reasonably have been anticipated from the careless setting of the fire, under all the circumstances surrounding the careless act, and if it was, under the circumstances, a natural consequence which any reasonable person could have anticipated, then the act is a proximate cause. *Fent et al. v. Toledo, P. & W. Ry. Co.*, 59 Ill. 349.

WALKER & LANDAUER, attorneys for appellee.

MR. PRESIDING JUSTICE CRABTREE DELIVERED THE OPINION OF THE COURT.

This was an action on the case in which appellee sued

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appellant to recover damages for injuries sustained by him in consequence of the collapse of a building in which he was working on July 3, 1890.

There was a trial by jury resulting in a verdict in favor of appellee for \$7,500, upon which he had judgment, the court having overruled a motion for new trial.

The suit was originally commenced against the executors of the last will and testament of Henry Mansfield, deceased (the former owner of the building), and also the devisees under said will, as well as appellant. Demurrer was filed to the declaration by all the defendants, and sustained as to all except the city of Peoria, leaving appellant as the only defendant.

The declaration alleged that the building in question, which was known as No. 103 South Water street, in the city of Peoria, was a three-story brick building, with a basement or cellar underneath the same, and having a sandstone foundation upon which to rest, and that the same had been and remained there for the space of fifty years and upward; that the building was erected by one Henry Mansfield, now deceased, from whom the defendants, other than the city of Peoria, derived title; that on November 1, 1893, Nathaniel Mansfield, as one of the executors of the last will and testament of Henry Mansfield, deceased, leased the premises to one J. A. Engstrom by a certain written lease for a period of four years, for the sum of \$144 per year.

And it is averred that at the time of making such lease "the said building and the walls and foundation thereof had become and were in a dangerous, ruinous, negligent and unsafe condition, and had been and remained so, carelessly and negligently, for a long space of time, to wit, for the space of fifteen years and upward, and so being in such dangerous, ruinous, negligent and unsafe condition, and having been in such condition so as aforesaid, the said building had become unfit for occupancy, and endangered the lives and persons of those who might lawfully be and remain in and upon the said building or premises. And the said building and walls and the foundation thereof so continued and

remained in such ruinous, dangerous, negligent and unsafe condition down to the third day of July, 1896, at which date last aforesaid the said building and walls and the foundation thereof had become and were so ruinous, dangerous, negligent and unsafe, that the application of any outside or external influence or force would cause or accelerate the said building to fall or give way, thus endangering the lives and persons of those who might lawfully be in and upon or about the said premises."

Inasmuch as appellant is now the only defendant, it is unnecessary to refer to the charges of negligence made against others who were originally made defendants with it, but the particular charge of negligence against appellant is that, having the control of the streets in the city of Peoria, it permitted the Chicago, Rock Island & Pacific Railway Company to so negligently and carelessly construct and maintain its tracks upon Water street, as to prevent the water falling thereon from flowing off the said street, and then failing to provide a sufficient catch-basin and sewer to carry off the water accumulating on such street, and preventing it from flowing off as it otherwise would have done, whereby it was caused to flow into the cellar of the building in question. And it is averred that on the said third day of July, 1896, "there was a rainstorm of somewhat more than usual volume, and that by reason of the railroad tracks being in the street, and there being no sufficient way provided for carrying off the water, it was forced into the cellar or basement of the building to a considerable depth, thereby weakening and softening the walls and foundation of said building, and causing the same to fall," thereby causing the injury to the plaintiff.

The declaration contained two counts, which are quite lengthy, and contain matter not important to be noticed, it having been inserted to charge other defendants not now before the court, but we have given the substance of the charges of negligence against appellant as contained in these two counts and the amendment thereto.

While the declaration avers a leasing of the building in

question by the executor of Mansfield, deceased, to J. A. Engstrom, there is nothing whatever in the evidence showing any such lease. It does appear from the evidence, however, that at the time the building fell and injured appellee, he was in the employment of said Engstrom, and was engaged in picking chickens in the second story of the building.

Adjoining the Mansfield building, in which appellee was at work, was what is known as the Woolner building, occupied as a saloon by one Casper Brodman. The evidence shows that the wall of the foundation of the Woolner building where it adjoins the Mansfield structure, has given way and fallen on two different occasions, once about four years before the collapse of the Mansfield building, and again on the day of the accident, when from fifteen to twenty-five feet of the foundation wall gave way and fell in along the center of the building, and during the afternoon before the Mansfield building fell, men were sent into the basement of the saloon to shore up the building where the wall was gone, by putting props under it, to accomplish which, they used jack-screws to raise and keep up the building.

About five o'clock in the afternoon, while appellee was at work picking chickens, having by his side a cook stove with a boiler of hot water upon it in which to scald the chickens so that they could be picked, the building in which appellee was working suddenly collapsed, carrying him down with it, forcing his arm into the boiler of scalding hot water, and pinioning him in such a manner that he could not remove it therefrom before it was so badly injured that amputation thereafter became necessary, and he thereby lost his arm. He also suffered other severe injuries from some of which, it is claimed, he has never recovered. There can be no question that he has been a great sufferer and sustained serious damages. But the important question in the case is, as to whether appellee, by his declaration and proofs, has made out a cause of action against appellant; because it is not to be held liable, unless the evidence shows that appellee's injuries are

the direct and proximate result of some negligence of appellant, or a neglect of some duty which it owed to him as one of its citizens.

And in order to recover, appellee must have proved, by a preponderance of the evidence, the cause of action as alleged in his declaration, and it must also appear that he was guilty of no contributory negligence, but was himself in the exercise of due care for his own safety at the time of the accident. While the declaration, as we have seen, alleged that the building had been for fifteen years in such a dangerous and unsafe condition as to endanger "the lives and persons of those who might lawfully be and remain in and upon the said building or premises," yet it nowhere avers that appellee did not know of this unsafe condition, and was not as well informed in relation thereto as appellant or any one else. Nor in his testimony does he say that he did not know of the unsafety of the building. All that he says on that subject is, that he never looked to see whether it was safe or unsafe. Although he may not have looked to see whether it was safe or not, he may have known perfectly well it was an unsafe structure for him to work in. If he did, then he was not in the exercise of due care for his own safety in being there at all, and his misfortunes are attributable to his own folly. He was working in the building for two years before it collapsed, and during that period was in the basement two or three times a week, and if there was any unsafety in the foundations, it was as well open to his observation as that of any one else. But even in his declaration he does not aver that he was in the exercise of due care for his own safety. What he does say is, that he was "exercising due care and caution in the employment of his then employer." The declaration, as well as the proofs, fall far short of showing that appellee was exercising due care and caution for his own safety at the time he received his injuries. But aside from any question of due care on the part of appellee, we are of the opinion that neither by the declaration nor the evidence does it appear that the appellee's injuries

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were the proximate result of any negligent act or omission of appellant. It may be that the construction of the railroad in the street had a tendency to prevent the flow of water as freely as it might otherwise have done, and it may be that the catch-basins and the sewers provided by the city for carrying off the surface water have proven of insufficient capacity to accommodate all the water which might fall during an unusual or excessive rain storm, and yet appellant be guilty of no negligence. The question is, has the city failed to do what a reasonable and prudent person would ordinarily have done under the same circumstances, or done that which such a person under the existing circumstances would not have done? The duty is dictated and measured by the exigencies of the occasion. *Baltimore & P. R. R. Co. v. Jones*, 95 U. S. 441. No higher duty is imposed upon a municipal corporation than upon a private individual under the same circumstances. The rule of liability as to both is precisely the same. We think the authorities are clear upon this proposition. In what, then, does the negligence of appellant consist? Certainly not in the mere fact of allowing a railroad to be constructed in a public street, provided reasonable care was used to prevent damage to abutting property. The city had the undoubted right to allow the use of the street or a portion thereof for railroad purposes, and if such use interfered with the natural flow of the water falling thereon, or passing over the same, it was the duty of the city to use reasonable care to provide means for carrying it off, so as to do no additional damage to adjoining property. We think the evidence shows that appellant did this. Indeed, it appears to us that it had taken extraordinary precautions in that regard. Without going into the details as to the construction and size of the catch-basins and sewers, the uncontradicted testimony of the city engineer is, that they were of ample capacity to take care of all the water which would ordinarily accumulate upon the street in question. It is true that on the day of appellee's injury, water flowed into the cellar of the building in which he was employed, in considerable volume

and quantity, and all the evidence shows that it came from an extraordinary rain storm, amounting to 2.68 inches over the whole area, and most of which, according to the testimony of one of appellee's witnesses, Michael Driscoll, fell within fifteen or twenty minutes. He says he never knew it to rain harder, or more water to run to the point in question than did at that time, and that the water was the deepest there then that he ever knew it. It is not disputed that the city had provided for a rain fall of two inches per hour over the area drained, and the evidence shows that one and one-half inches per hour is more than the ordinary rain fall. The city, then, having provided ample capacity to carry off all the water likely to fall or accumulate upon the street upon all ordinary occasions, was not guilty of negligence in failing to anticipate and provide for unexpected and extraordinary storms. "The rule is that the outlet must be of ample capacity to carry off all the water likely to be in it. But the rule is not applicable to an extraordinary and excessive rain fall, which is held to be *vis major*. Such infrequent and extraordinary occurrences can not be foreseen and provided against, and for damages caused by them no one is responsible." Phila., etc., R. R. Co. v. Davis, 68 Md. 281, S. C., 6 Am. State Rep. 440; Gulf, etc., Ry. Co. v. Pomeroy, 67 Tex. 498; Shearman & Redfield on Neg., Sec. 17 (note), p. 18.

The evidence shows that along the whole front of the Mansfield building there were open gratings left in the sidewalk, and maintained for the use and benefit of the owners or occupiers of the building, and it does not appear that any considerable quantity of water would have flowed into the cellar but for these open gratings through which it found its only passage. Certainly the city would not be liable to the owner or occupant of the building for damages occasioned by the flowage of water through these gratings, maintained by them for their own benefit, and appellee would stand in no better position in that regard than they would. Whatever may have been the relative rights and duties of Engstrom, the alleged tenant, and the

owners of the building, as to keeping the same in repair, appellee, as the employe of Engstrom, was in the same condition as concerned his right to recover for injuries as the tenant was, because he entered under the same title, and hence assumed the same risks. *Cole v McKey*, 66 Wis. 500; *Borman v. Sandgren*, 37 Ill. App. 160.

"The general rule is, that the occupant and not the owner, as such, is responsible for injuries received in consequence of a failure to keep the premises in repair." *Gridley v. City of Bloomington*, 68 Ill. 47; citing *Chicago v. Brennan*, 65 Ill. 160, and other cases. If, therefore, injury to the building was caused by the water flowing through these gratings, maintained by the occupant of the building, he could recover no damages therefor from the city, and his servant would stand in no better position. The cases are numerous supporting this proposition. It is to be observed that the declaration contains no charge of any injury to the foundation of the building by water flowing therein on any other occasion whatever, than that in the extraordinary storm of July 3, 1896. Some of the witnesses testified to water having entered into the building on other and former occasions, but the plaintiff himself testified that, although he had worked in the building for two years, he never saw water in the basement or cellar before the day of the accident. If appellee recovers at all, it must be upon the allegations of his declaration, which attributes the collapse of the building to the weakening of the foundations by the one storm above referred to. It would seem incredible, that if the foundations had been in a reasonably safe condition before, as he now seeks to claim, they could have been so weakened and undermined by one storm as to cause a collapse of the building within twelve or fourteen hours thereafter, without any other intervening cause, and yet this is the basis of his claim for damages as set forth in the declaration.

The contention of appellant is, that the fall of the wall under the Brodman building caused the weight of that structure to come upon the Mansfield building, which,

being in a dangerous and dilapidated condition, could not stand the strain of this additional weight, and, in consequence thereof, collapsed. There is much force in this contention, which finds support in the evidence, and affords a more reasonable theory for the causes of the collapse than is found in the claim of appellee, that it was in consequence of the weakening of the foundations by the storm of July 3d. We do not think the proofs show that the water falling at that time caused the building to collapse. The foundations were of sandstone, and the process of disintegration must have gone on for a considerable length of time in order to have so weakened them that they would not sustain the weight of the building. The evidence of the experts shows, that where sandstone, of the character of that composing this foundation, is kept continually wet, it will not disintegrate; but when it is wet and dried alternately, it will do so. Whatever may have been the fact as to the foundation in question, it is sufficient to say that no case is made by the declaration which would warrant a recovery on account of any former wetting of the foundation through any alleged negligence of appellee.

But even were it conceded that appellant was guilty of negligence in failing to provide sufficient catch-basins and sewers to carry off the surface water, yet we are of the opinion that appellee's injury, for which the jury have awarded him large damages, was not the proximate or natural result of any such negligence. Every person is to be held liable for all those consequences which might have been foreseen and expected as the result of his conduct, but not for those which he could not have foreseen, and was, therefore, under no moral obligation to take into consideration. *Shugart v. Egan*, 83 Ill. 56. The principal injury to appellee was the loss of his right arm, by reason of its having been so terribly scalded by the hot water he was using while picking chickens. He sustained other injuries and bruises of a minor character from which he substantially recovered, but the verdict of \$7,500 was, no doubt, given for the loss of his arm. It certainly can not be con-

tended with any show of reason, that appellant could anticipate or foresee that a failure to provide sufficient catch-basins or sewers for carrying off surface water, would lead to any such terrible result to one at work in a building on the street, and, therefore, under the rule above announced, it would not be responsible. Indeed, under our view of the case, the collapse of the building itself was not such a result as could have reasonably been anticipated or foreseen. But surely there was an intervening cause, a new and independent force, acting in and of itself, which produced the loss of the arm, and made the claim therefor too remote in the chain of causation. *Pullman Palace Car Co. v. Laack*, 143 Ill. 242; *Fent et al. v. T., P. & W. Ry. Co.*, 59 Ill. 349.

The test is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened, of itself sufficient to stand as the cause of the misfortune, the other must be considered as too remote. *Insurance Co. v. Tweed*, 7 Wall. (U. S.) 44.

Upon a most careful consideration of the whole case, we are constrained to hold that appellee has not made out a cause of action against appellant, and that it is not responsible for his injuries. Under this view of the case, we deem it unnecessary to discuss the questions raised upon the instructions, or to consider whether or not, if the appellee had proved a cause of action, the damages are excessive. Upon the facts, we hold that appellee is not entitled to recover, and the judgment will therefore be reversed. Judgment reversed.

FINDING OF FACTS TO BE MADE A PART OF THE JUDGMENT.

We find, as a fact, that appellant was not guilty of any negligence which caused the injuries to appellee.

We further find, as a fact, that the injuries to appellee were not the proximate or natural result of any negligent act or omission on the part of appellant.

James Reardon v. A. D. Smith.

1. **APPELLATE COURT PRACTICE—***Pointing Out Objections to Instructions.*—When an appellant complains of instructions as erroneous, it is his duty to point out specifically the error complained of, otherwise the court will be under no obligation to consider error assigned thereon.

2. **PRACTICE—***Waiving Arguments.*—A plaintiff may waive his opening argument to the jury, and if the defendant then waives his own argument, the plaintiff will not be entitled to close, but the case will go to the jury without argument.

Assumpsit, for physician's services. Error to the Circuit Court of Grundy County; the Hon. GEORGE W. STIPP, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed December 17, 1897.

E. L. CLOVER, attorney for plaintiff in error.

S. C. STOUGH, attorney for defendant in error.

MR. PRESIDING JUSTICE CRABTREE DELIVERED THE OPINION OF THE COURT.

Defendant in error sued plaintiff in error before a justice of the peace to recover a balance claimed to be due him for services rendered as a physician.

On a trial before the justice, defendant in error recovered a judgment for \$48.91 and costs, from which judgment plaintiff in error appealed to the Circuit Court, where, upon a trial by jury, defendant in error had a verdict for \$33.91, and a motion for new trial being overruled, judgment was entered on the verdict.

While numerous errors are assigned upon the record, only two are relied on in argument, as grounds for reversal. These are, first, error in giving certain instructions at the instance of defendant in error; and second, in the rulings of the court upon the argument of the cause to the jury.

So far as the first objection is concerned, counsel for plaintiff in error does not attempt to point out in his argument, wherein the instructions complained of are erroneous.

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He asserts the proposition that the instructions are manifestly wrong, but leaves it to us to ascertain for ourselves where the error lies. When it is insisted that instructions are so erroneous as to be cause for reversing a judgment, it is the duty of counsel to point out specifically the errors complained of, otherwise we do not feel under obligations to consider the error assigned thereon. Nevertheless, in this case we have carefully examined the instructions complained of, and do not see that they are seriously open to criticism. They seem to be in substantial conformity with Sec. 17, Chap. 83, Rev. Stat., upon the subject of limitations as applied to mutual accounts.

As to the second error relied on, we think plaintiff in error is not in a position to raise the question in this court.

The situation, as we understand it, was this: At the close of the evidence counsel for plaintiff (below) stated that he waived the opening argument to the jury. To this counsel for defendant objected, but stated that he was willing to waive his argument to the jury, provided counsel for the plaintiff should make no argument. The court ruled that plaintiff could waive an opening argument, and then, if counsel for defendant made no argument, the plaintiff would have a right to make a closing argument. While the ruling of the court was excepted to by plaintiff in error, yet his counsel proceeded to argue the case to the jury, which certainly gave a clear right to the plaintiff to make a closing argument. We think that by arguing the cause to the jury, plaintiff in error waived any objection to the ruling of the court in that behalf. Had he refused to argue the case, then, if the court had permitted counsel for the plaintiff (below) to make a so-called closing argument, and the proper exceptions had been taken, the question would have been saved for the consideration of this court. As the record now stands, we think there is nothing in that question for us to pass upon, and yet it is not improper for us to say that in our opinion the court was in error as to the correct practice in such cases. Our understanding of the rule is, that the plaintiff may waive the opening argument to the

jury, and if the defendant waives an argument to the jury on his part, the case will go to the jury without argument. But when the plaintiff waives the opening, and the defendant makes an argument, the plaintiff will have the right to close, although he has made no opening argument. *Trask v. The People*, 151 Ill. 523.

Finding no reversible error in the record, the judgment will be affirmed.

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Emma Johnson v. N. J. Gram and W. T. Hays.

1. INTOXICATING LIQUORS—*Construction of the Dram Shop Act.*—The dram shop act (R. S., Chap. 48) must be given such a construction as will, without doing violence to its terms, carry out its spirit and accomplish the purposes set out in its title—"To provide for the licensing of and against the evils arising from the sale of intoxicating liquors."

2. SAME—"Treating."—Several men were in a dram shop indulging in the practice of "treating" each other to intoxicating liquors. One of them became so intoxicated that in crossing a railroad track in going home he was killed by the cars; it did not appear from the evidence that he paid for any of the liquors, but drank them upon the "treat" of the others. The liquor was set out upon the bar for him to drink, and he drank it in the presence of the dram shop keeper. *Held*, that such a sale was within the meaning of section 9 of the dram shop act (R. S., Chap. 48), and the dram shop keeper was liable.

Action on the Case, under section 9 of the "dram shop act." Error to the Circuit Court of Warren County; the Hon. HIRAM BIGELOW, Judge, presiding. Heard in this court at the May term, 1897. Reversed and remanded. Opinion filed December 17, 1897.

J. H. HANLEY and GRIER & STEWART, attorneys for plaintiff in error.

In construing penal statutes we must not, by defining, defeat the obvious intention of the legislature. *Potter's Dwarris on Statutes*, etc., page 247.

For the sure and true interpretation of all statutes in general, be they penal or beneficial, restrictive or enlarging of the common law, four things are to be discerned and considered: (1) What was the common law before the making

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of the act. (2) What was the mischief and defect against which the common law did not provide. (3) What remedy the parliament hath resolved and appointed to cure the disease of the commonwealth. (4) The true reason of the remedy. Potter's Dwarries on Statutes, etc., page 184.

Statutes must be interpreted according to the intent, and not always according to the letter. A thing within the intention is within the statute, though not within the letter; and a thing within the letter is not within the statute unless within the intention. Connolly v. The People, 42 Ill. App. 36.

The dram shop act is penal and must receive a strict construction, keeping in view the great central object the legislature had in view in its enactment, and the evils to be prevented. Albrecht v. The People, 78 Ill. 510.

COOKE & STEVENS and GEORGE M. HOFFHEIMER, attorneys for defendants in error.

The dram shop act is a statute of a highly penal character, and provides rights of action unknown to the common law, and should, according to well understood canons, receive a strict construction. Cruse v. Aden, 127 Ill. 231; Meidel v. Anthis, 71 Ill. 241; Freese v. Tripp, 70 Ill. 496.

MR. PRESIDING JUSTICE CRABTREE DELIVERED THE OPINION OF THE COURT.

This was an action on the case brought by plaintiff in error against defendants in error, to recover damages for injury to her means of support, occasioned by the death of her husband, William Johnson, while in a state of intoxication, caused, as it is alleged, in whole or in part by liquors sold or given by defendants in error, who were dram shop keepers in the city of Monmouth, on the 20th day of July, 1893.

There was a trial by jury and verdict in favor of plaintiff in error for \$275. Being dissatisfied with the amount of damages assessed, she entered a motion for new trial, which, being overruled, judgment was rendered on the verdict, and she prosecutes this writ of error.

Various errors are assigned upon the record, but the most serious complaint is made as to the action of the court in giving, refusing and modifying instructions. Whether the court erred in this matter depends upon the proper construction to be put upon section 9 of the dram shop act under which this suit is brought.

The evidence shows that on the day of his death, the deceased, William Johnson, one Thomas Bell, the witness Wyatt, and others, were drinking together in the saloons of defendants in error. The deceased became so intoxicated that he had to be helped into his wagon. He was incapable of managing his team, which, getting beyond his control, attempted to cross the railroad tracks when the gates were down for an approaching train, and while doing so, Johnson fell out of his wagon, the moving train passed over him and caused his death. From all the evidence we think it is clear that Johnson's death was the direct and proximate result of his intoxication, and but for that he would not have been killed. While the evidence is clear enough that Johnson became intoxicated in the saloons of defendants in error, there is no satisfactory proof that they sold or gave him any intoxicating liquor directly. Such liquors as he drank and which caused his intoxication were paid for by persons who called deceased and others up to the bar, and "treated" them at several different times within the space of an hour or two. Bell and Wyatt appear to have done the treating (so far as the evidence shows with any certainty), the manner of it being that the several parties, including Johnson, were ranged up in front of the bar, and Bell or Wyatt would call for the drinks, when the liquors severally called for by the parties would be set in front of them individually by the bar keeper, and drank in the presence of the latter, being paid for by the person calling for the liquors or standing the "treat." In this manner Johnson continued drinking until he became intoxicated with the result above mentioned.

Under this state of facts it is contended by defendants in error that there is no liability, and at their instance the

court gave several instructions to the jury, holding the law to be as claimed by them. The following is one of such instructions, viz. :

“ In this case if the preponderance of the evidence shows that William Johnson did not himself purchase any of the intoxicating liquors proven to have been drank by him at the saloons of either of the defendants, then you can not find that either of the defendants sold him any liquor. And if the preponderance of the evidence shows that another person treated the party, of which William Johnson was one, that they all stepped up to the bar and received the liquor from the bar tender, to which they were treated by such person, and if among such party so treated and getting and drinking intoxicating liquor was William Johnson, but the other and treating party paid for the intoxicating liquor, and it was set out on his credit and with the expectation both on his part and that of the bar tender that it would be paid for by him, the treater, such an act if done in good faith can not be construed as a gift of liquor to William Johnson by any defendant, but was a gift from such treating party. And from proof of such act alone the jury can not find that either defendant sold or gave intoxicating liquor to William Johnson, or that either defendant was or is guilty.”

Instructions embodying the opposite of the proposition contained in the foregoing, were asked by plaintiff in error and refused by the court, so that the question is fairly presented by this record, whether a dram shop keeper, who dispenses liquor over his bar, under the system of “treating,” whereby one of a number of men partaking of such liquor becomes intoxicated (although not himself calling for any liquor, or directly paying for the same), and in consequence and as a direct result of such intoxication loses his life, is liable, under the statute, to one who is injured in his or her means of support by reason of such death.

As we have already said, this question must be determined by the construction to be placed upon the dram shop act.

That this is a serious and important question, involving

doubt and difficulty, may be conceded at the outset, because on the one side it is held that the dram shop act is a statute of a highly penal nature and should receive a strict construction (*Cruse v. Aden*, 127 Ill. 231), and on the other hand it has been held that the statute was designed for a practical end, to give a substantial remedy, and should be allowed to have effect according to its natural and obvious meaning. *Schroder v. Crawford*, 94 Ill. 357.

We think the law must be given such a construction as, without doing violence to its terms, will carry out its spirit, and accomplish the purpose set out in the title of the act, which is, "To provide for the licensing of, and against the evils arising from the sale of intoxicating liquors."

Section 9, under which this action is brought, is as follows: "Every husband, wife, * * * who shall be injured in person or property or means of support, * * * in consequence of the intoxication * * * of any person, shall have a right of action in his or her own name, severally or jointly, against any person or person who shall, by selling or giving intoxicating liquors, have caused the intoxication, in whole or in part, of such person or persons."

It is to be observed that the law does not say that the person injured shall have a right of action against the party selling or giving intoxicating liquors to the person becoming intoxicated, but it gives a right of action generally against any dram shop keeper who, by selling or giving intoxicating liquors, contributes to the intoxication of the person through whom the injury is caused. In this respect there is a marked difference between the section of the statute under consideration and section 6 of the same statute, which provides a penalty against one selling or giving intoxicating liquor to any minor or to any person in the habit of getting intoxicated, and under which section, upon an indictment for selling liquor to a minor, it was held that a sale to an adult with the knowledge of the saloon keeper that the liquor was to be drank by the minor, was not a violation of the statute. *Siegel v. The People*, 106 Ill. 89.

There is nothing, however, in the case just cited which

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leads us to suppose, that had the language of section 6 been as broad as that of section 9 the Supreme Court would have held there was no liability. No question was raised as to a gift of liquor to the minor, and the point of the decision was, that the conviction was wrong because the defendant was tried and convicted for selling liquor to a minor, while the proofs showed only a sale to an adult. We do not think this case is of controlling force on the question now before us, because of the wide difference in the wording of the two sections of the statute.

It is true that in the case of *Flynn v. Fogarty*, 106 Ill. 263, Mr. Justice Mulkey speaking for the court, and having under consideration the section of the statute now before us, used this language: "To make out a case, under the statute, it was necessary for her (the widow) to satisfactorily establish, first, that the defendants sold or gave to the deceased intoxicating liquors." * * * A similar statement is made by Mr. Justice Magruder in *McMahon et al. v. Sankey*, 133 Ill. 641, but in neither of these cases was the question raised as to who bought and paid for the liquor which produced the intoxication, and hence the precise question we are considering was not before the court. Our attention has not been called to any decision by our own Supreme Court wherein this question was fairly involved, and we know of none.

In the case of *Sibila v. Bahney*, 34 Ohio St. 399, the court say: "Although the liquor was called for and paid for by another, yet it being designed to be drank by the person calling for it and Bahney, at the defendant's bar, and the defendant knowing that Bahney was there to drink the same, and furnishing it for that purpose, such act by the defendant would constitute a furnishing by him to Bahney."

In *State v. Hubbard*, 60 Iowa, 466, the defendant was convicted of the crime of disposing of intoxicating liquor to one Johnson, an intoxicated person. The proofs showed that whatever liquor Johnson drank in the saloon of the defendant, was upon the "treat" of one Andrews, and it

was contended that this was not a "disposing" of liquors to Johnson. An instruction to this effect was refused by the trial court, which ruling was sustained by the Supreme Court.

In another Iowa case (*Judge v. Jordan et al.*, 81 Iowa, 519, 46 N. W. Rep. 1077) a saloon keeper was sued for selling intoxicating liquor to plaintiff's husband. The evidence showed that defendant's saloon was open at night while a fire was raging near by; plaintiff's husband was assisting at the fire. One Gage said to defendant Jordan, "Give the fire department a round on me; I will pay for it." In compliance with this, defendant and his bar keeper dealt out intoxicating liquors, for which Gage afterward paid. Plaintiff's husband drank of this liquor and was afterward found in an alley in a helpless state of intoxication. He was so badly frozen as to necessitate the amputation of one of his legs. The trial court charged the jury that if Jordan or his bar keeper, acting upon the direction of Gage, furnished Judge intoxicating liquors, or furnished it to others in his saloon, from whom the plaintiff's husband obtained it, then it was a selling to said Gage and plaintiff's husband; *held*, that the instruction stated the law correctly as applied to the issues in the case.

In *Walton v. State*, 62 Ala. 197, it was held that where intoxicating liquors are sold to a third person with the knowledge that a person of known intemperate habits is to join in drinking it, and such intemperate person is permitted to drink such liquor in the presence of the party selling, he is guilty of the offense denounced by the statute. 11 Am. & Eng. Ency. of Law, 708.

It is true that the cases cited were decided under statutes slightly different from ours, and yet we think a careful comparison will show that the Illinois statute is as broad and comprehensive in its terms as those of the States in which these decisions were rendered. It can not be seriously contended that the intoxication of plaintiff in error's husband was not produced in whole or in part by intoxicating liquor sold or given by defendants in error. Not sold or given directly

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to him, but to others for him, which we think is not only within the letter, but within the entire spirit of the act. Any other construction fritters away and renders valueless the remedy sought to be given by the act. The legislature must be supposed to have understood the language it used in the several sections of the dram shop law. Under the sixth section the sale or gift must be made to the minor or person in the habit of getting intoxicated, in order to create a liability. But not so in the ninth section. The language used is general, that the right of action shall exist against any person, who, by selling or giving intoxicating liquors shall have caused the intoxication. Manifestly the legislature had some purpose in using this language in the ninth section so different from that in the sixth section, and we think the object was to cover just such cases as the one now before us. What possible difference can it make to the defendants in error whether Johnson paid for the liquor he drank or it was paid for by others? The liquor was set out upon their bar for him to drink, and he drank it in their presence, they knowing the probable consequence would be that he would become intoxicated, as he did, which according to common observation is not an unusual result when a number of men in a saloon indulge in the practice of treating each other to intoxicating drinks. We are of the opinion that the sad results shown in the case at bar were within the purview of the legislature in the adoption of the dram shop law, and among the evils sought to be remedied by that act. Any other construction than that we place upon it would not accomplish the purpose which the framers of the law evidently intended.

Our conclusion is that the court erred in giving instructions 8, 9, 10, 11 and 12 on the part of defendants in error, and in modifying instructions 1, 2 and 4 asked by plaintiff in error. Had the jury followed these instructions they must have found for the defendants in error, yet, nevertheless, they gave plaintiff in error a small verdict. How far the jury may have been influenced in their assessment of damages by the misdirection of the court as to the law of the case we can not say, but, under the evidence, if plaintiff

was entitled to recover at all, she should have been awarded damages which would in some measure reasonably compensate her for the loss sustained. A verdict of \$275 is, in our judgment, entirely inadequate.

The evidence shows that deceased was a very strong, robust man, weighing 180 pounds, five feet eight inches in height, and only thirty-eight years old. He earned from \$1.50 to \$3 per day accordingly as he worked with or without his team. He supported his family comfortably from his earnings and was paying for a home through a homestead loan association. By his untimely death plaintiff's means of support were entirely cut off, and it can not be said that the verdict rendered in this case does her substantial justice. We think the judgment should be reversed and the cause remanded to be tried by another jury under proper instructions as to the law of the case. Reversed and remanded.

WRIGHT, J.

I do not concur in the opinion of the majority of the court, because I think it a clear departure from the construction put upon the statute by the Supreme Court of our State.

Matthiessen & Hegeler Zinc Co. v. Celia Ferris.

1. NUISANCE—*Gaseous Smell, Smoke, Cinders, etc., from Zinc Works.*—Smoke, hot ashes, cinders and gaseous smell, the refuse of, and thrown out by zinc works upon premises occupied as a homestead, destroying trees and rendering the home uninhabitable, constitute a nuisance for which an action will lie.

2. DAMAGES—*Three Hundred and Sixty-seven Dollars Not Excessive.*—A verdict for \$367 in an action for damage for the destruction of fruit, ornamental and shade trees, and rendering a home uninhabitable by reason of smoke, hot ashes, cinders and gaseous smells thrown out from zinc works and cast upon the premises, is not excessive.

3. OFFERS OF SETTLEMENT—*Not Admissible in Evidence.*—An offer to compromise a matter in dispute and avoid a law suit, by the plaintiff, not accepted by the defendant, can not be used on the trial as an admission as to the amount of damages sustained.

Matthiessen & Hegeler Zinc Co. v. Ferris.

Trespass on the Case — Nuisance, etc.—Appeal from the Circuit Court of La Salle County; the Hon. CHARLES BLANCHARD, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed December 17, 1897.

DONOGHUE & BULL and CLARENCE GRIGGS, attorneys for appellant.

It is not every trifling impregnation of the atmosphere that creates a nuisance. There are many uses of property for the ordinary purposes of life that produce more or less of discomfort, and, where these are necessary incidents of the ordinary use of property, and are only occasional, and produce no real or substantial damage, they must be borne with as results that can not reasonably be avoided. The damage must be real, not fanciful, not a mere annoyance to a person of fastidious tastes and habits, but such sensible and real damage as a sensible person, if subjected to, would find injurious to him. Wood on Nuisances, Sec. 532.

The injury must be something more than a fanciful inconvenience. The question of mere delicacy or fastidiousness arising from delicate and dainty habits of life would not be a clear and plain interference with ordinary comforts and enjoyments. *Cooper v. Randall et al.*, 53 Ill. 24; *Ibid.*, 59 Ill. 317; *Walter v. Selfe*, 4 Eng. L. & Eq. 22.

DUNCAN, HASKINS & PANNECK, attorneys for appellee.

For a nuisance affecting health and personal comfort, injury sustained not only by the plaintiff but also by members of his family, whom he is bound to support, is a proper element of damage. *Jarvis v. St. Louis I. M. & S. R. R. Co.*, 26 Mo. App. 253; *Pierce v. Wagner*, 29 Minn. 355; 16 Am. & Eng. Ency. of Law, 986; *Wenona Zinc Co. v. Dunham*, 56 Ill. App. 351.

MR. PRESIDING JUSTICE CRABTREE DELIVERED THE OPINION OF THE COURT.

Appellee sued appellant in an action on the case to recover damages for the destruction of fruit trees, ornamental and shade trees, and the rendering of her home uninhabitable by reason of smoke, hot ashes, cinders and gaseous smells,

being thrown and cast upon her premises, in consequence of the deposit by appellant of large quantities of red-hot cinders and refuse from its zinc works, upon a lot adjoining the home and premises of appellee. There was a trial by jury resulting in a verdict and judgment in favor of appellee for \$367.

As grounds for reversal, it is insisted by appellant that the court erred in giving, refusing and modifying instructions; also in the admission of evidence, and that the damages are excessive.

The only material objection to the admission of evidence is as to the deed from appellee's deceased husband to her of the premises in question, upon the ground they were the homestead of the parties, and therefore the deed was a nullity. It is a sufficient answer to this proposition to say, that there is no proof in the record that the premises were the homestead of the parties prior to, or at the time, the deed was executed and delivered. Appellee testified she had occupied the premises as a homestead since the date of the deed, but the evidence is silent as to what the conditions were before that time.

We think there was no serious error on the part of the court in its action on the instructions.

Nor can we say that the damages are excessive. The injury to appellee was serious and the inconvenience and discomfort she suffered were a great wrong to her, for which she was entitled to recover substantial damages, in addition to the pecuniary loss sustained by her in the destruction of her vegetables, fruit and shade trees. Her proposition to accept \$50 in settlement of her claim for damages, appears to have been made by way of compromise, to avoid a lawsuit, and should not be taken against her as a confession or admission as to the amount of her damages.

Appellant did not see fit to accept the offer, and therefore it should go for nothing, and should not be used to fix the amount of damages upon a trial by the jury.

Seeing no just reason for reversing the judgment it must be affirmed.

Lewis Fouts v. Sherman Bocock.

1. **JURIES**—*Determine Questions of Fact.*—The question as to whether a contract exists between the parties, is one of fact for the determination of a jury.

Assumpsit, for money wrongfully retained. Appeal from the Circuit Court of Stark County; the Hon. N. E. WORTHINGTON, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed December 17, 1897.

B. F. THOMPSON, attorney for appellant.

F. A. KEENS, attorney for appellee.

MR. PRESIDING JUSTICE CRABTREE DELIVERED THE OPINION OF THE COURT.

This was a suit by appellant against appellee to recover \$250, being part of the proceeds of a farm sold by appellee as agent of appellant, and which the latter claims was wrongfully retained by the former.

It appears from the evidence that appellant was the owner of a farm in Stark county in this State, and being about to remove to Nebraska, he made an arrangement with appellee, his nephew, to try and sell it for him.

Appellant claims the only agreement for compensation was, that appellee should have all he could get over \$75 per acre, or \$12,000 for the quarter section.

On December 14, 1893, appellee wrote appellant, who was then at Omaha, that he could sell the farm for \$11,750, and advised him to sell for that price, and said he would charge a commission of \$50 for making the sale. The fact was that appellee then had found a purchaser for the farm at \$12,000, although he did not so inform appellant. Appellee sent to appellant a written contract to be signed by the latter, authorizing the sale of the farm at \$11,750, which was duly signed and returned to appellee, who then sold the farm to one Stange for \$12,000, and received \$300 as earnest money. Appellant came on from Nebraska to close

up the deal, and appellee then told him he had sold the farm for \$12,000 and retained the \$300 for commissions. Appellant seems to have made no objection but went on, closed up the sale with the purchaser by executing and delivering a deed for the farm, and receiving \$11,700 as the balance of the purchase money. Appellee swears appellant appeared to be satisfied, and said that appellee had done pretty well but ought to divide. That this was said in a joking way, no further demand being made for any part of the \$300 until two years afterward, when this suit was brought. The case being tried by a jury, there was a verdict and judgment in favor of appellee.

It was a question for the jury, under all the circumstances, whether appellant did not assent, after learning all the facts, to appellee's retaining the whole of the \$300 as commissions for making the sale. By the first instruction given at the instance of appellant, as well as by the second given for appellee, the question was submitted to the jury, whether or not appellant, after learning all the facts, agreed to accept the \$11,700 as the price of the farm, and these instructions did not require such agreement to be in express terms, although the second instruction given for appellant did require an express agreement. Having asked and had given in his behalf, an instruction submitting the question of an implied agreement to the jury, he can not now complain that the jury found he did, impliedly, agree to receive the \$11,700 in full settlement of the transaction. The fourth instruction asked by appellant was properly refused by the court, because it entirely ignored the question of settlement, or agreement to receive the \$11,700 after learning all the facts.

No doubt the circumstance that appellant waited nearly two years before making demand for the \$250 or bringing suit, was a fact of some weight with the jury in determining his understanding or intention when he closed up the sale.

The evidence was all before the jury, and we think it was sufficient to support the verdict. There being no error in the record, the judgment will be affirmed.

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